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MISCELLANEOUS AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 461

UNITED STATES OF AMERICA,

Appellant,

v.

COLUMBIA STEEL COMPANY, CONSOLIDATED STEEL CORPORATION, UNITED STATES STEEL CORPORATION, AND UNITED STATES STEEL CORPORATION OF DELAWARE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF OF APPELLEES, COLUMBIA STEEL COMPANY, UNITED STATES STEEL CORPORATION AND UNITED STATES STEEL CORPORATION OF DELAWARE*.

This is an appeal from a judgment of the District Court dismissing the complaint on the merits on findings after a trial, entered November 14, 1947 (R. 67).

Opinion.

The opinion of the District Court (R. 54) is reported in 74 F. Supp. 671.

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* The Columbia Steel Company will be referred to as "Columbia"; The United States Steel Corporation and its wholly-owned subsidiaries as "U. S. Steel", and the Consolidated Steel Corporation as "Consolidated".

Statutes Involved.

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. A. provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Section 2 of said Act provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Questions Presented.

The complaint makes two concrete and definite charges, and only two; viz:

> "10. The necessary effect of said agreement is to eliminate substantial competition in the sale of rolled steel products and the manufacture and sale of fabricated steel products and said agreement is therefore in itself an unreasonable restraint of trade and commerce in violation of section 1 of the Sherman Act.
>
> "11. In making said agreement Columbia, U. S. Steel, and U. S. Steel of Delaware, have concertedly attempted to monopolize the production and sale of fabricated steel products in the Consolidated market in violation of sections 1 and 2 of the Sherman Act." (R. 3.)

The issues raised by the denials of those two charges were the only issues litigated and decided by the District Court.

The District Court found in favor of the appellees on those issues by definite and precise findings of all the essential ultimate and supporting facts (R. 35-53).

In its "Statement as to Jurisdiction", which was submitted to and considered by this Court in noting probable jurisdiction (R. 687), the appellant stated that the suit was filed to "enjoin consummation of an agreement made on December 14, 1946, * * * upon the ground that the purchase would eliminate substantial competition in the sale of both fabricated and rolled steel products".

The appellant now says in its statement of "Questions Presented", page 2 of its brief:

> "The basic question presented is whether acquisition of Consolidated Steel Corporation by United States Steel Corporation (referred to as U. S. Steel) constitutes, under any or all of the following circumstances, a combination in unlawful restraint of interstate commerce:"

It then states three sets of assumptions of fact, (a), (b) and (c), which were neither alleged, proved, nor found.

(a) makes the definite assumption that U. S. Steel acquired Consolidated "with the effect and for the purpose of monopolizing the business of supplying the rolled steel requirements of the acquired company and eliminating it as a market outlet for all other producers of rolled steel".

(b) and (c) do not assume any definite offense, but state assumptions of fact, neither proved nor found, from which, as indicated by its later statement and argument, it expects the inference to be drawn that the acquisition assumed in (a) will have the effect to eliminate substantial competition in "structural steel products", evidently meaning "fabricated structural steel products" and in pipe "for long-distance oil and gas pipe lines".

It then says:

> "The case presents the further question whether the agreement to acquire Consolidated constitutes an attempt by U. S. Steel to monopolize interstate commerce in fabricated steel products in the marketing area served by Consolidated."

Under its "Statement" (page 4) it purports to state the two charges of the complaint (1) "that consummation of this agreement would eliminate substantial competition in the sale of steel and steel products" and (2) that "U. S. Steel and its co-defendant subsidiaries have concertedly attempted to monopolize a part of interstate commerce".

Statement.

The complaint (R. 1) does not allege any attempt by U. S. Steel to acquire Consolidated nor any combination or conspiracy between them. Neither does it allege any purpose or intent of U. S. Steel to monopolize the sale of rolled steel products. Its monopoly charge is limited to fabricated steel products.

It does allege a simple purchase and sales contract, annexed to the complaint (Ptfs. Ex. 1, R. 453), by which Consolidated agreed to sell and Columbia agreed to buy Consolidated's fabricating business and facilities for a stipulated price. The contract imposes no restraints on either buyer or seller. Each is free to engage in any business it pleases, at any time or place that it pleases, and to buy or sell from or to whomsoever it pleases.

Consolidated retains its independent corporate existence and a considerable amount of other assets, as the appellant itself asserts.

The appellant pays scant attention to the findings, which state the case here under review with unusual clarity and precision. We say that they were not only supported by uncontradicted evidence but were required by such evidence. The appellant's only witness was an economist, much of whose statistical data was discredited by his own admissions (R. 424-5, 430, 436-441). His testimony is the basis of the appellant's repeated statements that U. S. Steel was first and Consolidated was second in the Consolidated market.

The appellees called their top officials who had first-hand

knowledge of the facts to which they testified. Their testimony stands undenied and unimpeached and is supported by a mass of statistical data which is not even questioned, with the exception of one exhibit, which is said to show "a large element of conjecture and hypothesis". The candor, credibility and competence of the appellees' witnesses are revealed even by the written word.

The appellant draws inferences from isolated facts without any regard to the related facts which rebut the inferences drawn. Its brief abounds with statements, inferences and assumptions, like those in its statement of "Questions Presented", for which there is no warrant either in the evidence or the findings.

Its incomplete statement imposes the burden on the appellees of stating the case established by the evidence and the findings.

I.

The business of Consolidated.

Consolidated is engaged in the business of making and selling fabricated *structural*, steel products and fabricated *plate* products (R. 332). It uses as its raw materials rolled steel products such as plates, sheets, structural shapes and bars. The business of fabricating plate products and the business of fabricating structural steel products are distinct and different businesses requiring different facilities and producing different products (Fdg. 6, R. 36). U. S. Steel is engaged in the fabricated structural steel business but it is not in the plate fabricating business (Fdg. 7, R. 36-37). Approximately 16 per cent of Consolidated's total commercial business (excluding wartime shipbuilding) was the fabrication and sale of structural steel products (Ptfs. Ex. 2, R. 501-506).

As a part of its fabrication of plates and sheets, Consolidated is engaged in making certain specialized types of pipe which is fully discussed later.

Consolidated's principal structural fabricating plant is located near Los Angeles, California (R. 333), and it also owns and operates a small structural fabricating plant at Orange, Texas, which it purchased in 1940 for $63,000 (R. 335). Its principal plate fabricating plants are near Los Angeles and at Vernon and South San Francisco, California. It has other very small plate fabricating plants serving local areas (R. 333-335).

Consolidated sells its products principally in California and to a lesser extent in ten other western states originally designated by appellant and sometimes referred to as the Consolidated market (Fdg. 19, R. 40).

The relation of Consolidated's steel purchases to steel production and data relating to its competitive situation are appropriately discussed below. One point, however, should be disposed of here. In attempting to over-emphasize the importance of Consolidated, appellant refers in several places in its brief to Consolidated's World War II shipbuilding activities.

Like many other companies, Consolidated engaged in war-time shipbuilding under Government sponsorship. It was not engaged in the business of building ships prior to the war and has not engaged in it since (Fdg. 19, R. 40), and has no shipbuilding facilities whatsoever (R. 341). Nevertheless, these purchases and this type of business are included in appellant's estimations and appellant even includes, as part of Consolidated's purchases of raw materials, purchases actually made by the Maritime Commission for shipbuilding (Ptfs. Ex. 2, R. 510).

Among other things:

(1) Consolidated is only a minor factor in the structural fabricating business. Its bookings of structural steel for bridges, buildings and other permanent structures during the six-year period 1937-1942 were 85/100 of 1 per cent of the national business (Fdg. 21, R. 40). U. S. Steel does about 20 per cent

of that business nationally and Bethlehem Steel Company, the chief competitor of U. S. Steel, does about an equal amount of fabricated structural steel business (R. 237). Bethlehem also makes and sells fabricated plate products and is the second largest producer of rolled steel products (Fdg. 35, R. 45-46). No data are available to show Consolidated's participation in the much larger plate fabrication industry. There are other large structural fabricating companies both within and without the eleven state Consolidated market area. One hundred fabricators successfully bid against U. S. Steel in the sale of fabricated structural products in the eleven states during the ten-year period, 1937-1946 (Fdg. 36, R. 46).

(2) Consolidated is not a producer of rolled steel products. It has no blast furnaces, no open hearths or rolling mills or other facilities for the production of rolled steel products. It has only fabricating plants (R. 331-335). The agreed-upon purchase price for the sale of Consolidated's assets is less than the estimated depreciated value of its plants (R. 323-324) and less than a third of the cost of a modern sheet cold reduction and tin plate mill of which there are many in the steel industry (R. 658).

The statement is made that Consolidated is engaged in making a wide variety of fabricated steel products, and reference is made to a list of fifty types of individually made to order products in appellant's brief at page 48. As appellant's brief states "Except for certain types of culvert pipe, Consolidated is not engaged in the repetitive, mass-production manufacture of identical stock products; rather, it fabricates products to meet a particular purchaser's specification and requirement" (App'ts. Br. p. 6). The types of products which Consolidated can make are limited only by its ability to meet the purchaser's specifications

and delivery requirements within the limitations of its plants and equipment and availability of materials for steel fabrication but this does not demonstrate that Consolidated or any other fabricator is engaged in making a wide variety of products or that such fabricator has "the ability * * * to engage in large-scale manufacture of new steel products when and if this seems advantageous" (App'ts Br. p. 30).

II.

The business of United States Steel Corporation subsidiaries.

U. S. Steel is the largest integrated producer of steel products in the United States but it is about one-half (R. 269) the size in relation to its competition that it was at the time of its organization in 1901. It now has approximately one-third of the steel ingot capacity of the industry (Defs'. Ex. 37, R. 589). It does about 20 per cent of the fabricated structural steel business of the country, a business in which it has been engaged for over forty years, and at the time of its organization it did about 44 per cent of that business (R. 271, 238).

At the time of the proposed sale of the Geneva steel plant by War Assets Administration, after reviewing national steel capacity and the capacity of U. S. Steel, the Attorney General gave his opinion that he did not view the sale as a violation of the anti-trust laws (Defs'. Ex. 66, R. 679). It is an unwarranted and unsupported statement to say that U. S. Steel's "vast resources give it almost unlimited powers of vertical and horizontal expansion * * *". It is engaged in a highly competitive industry and has all the problems of every other business.

In the Attorney General's opinion in connection with the sale of the Geneva plant he stated:

> "If the capacity of the Geneva Plant, amounting to 1,283,000 tons, is added to the present capacity of the

United States Steel Corporation, that corporation's share of the national capacity will rise from its present 31.4% to 32.7% of the national total. * * * I have also considered certain statistics regarding the capacity of the steel industry in the Far West.[1] These statistics show that the Far West, exclusive of Geneva, has an aggregate annual ingot capacity of approximately 3,619,000 tons, of which United States Steel Corporation has a capacity of approximately 628,000 tons, or 17.3% Total far-western capacity, including Geneva, amounts to approximately 4,900,000 tons. If United States Steel Corporation acquires the Geneva Plant, it would have 1,911,000 tons, or 39% of the total capacity of the Far West" (R. 681).

The statement of appellant's brief that since its acquisition of the Geneva plant, U. S. Steel has had over 51 per cent of the ingot capacity of the Pacific Coast area creates the inference that U. S. Steel has expanded in that area for unjustifiable motives, and also shows a figure which fails to include the ingot capacity of Colorado. To illustrate, if appellant confined its discussion of ingot capacity to the State of Utah, it could state with complete exactness that U. S. Steel has 100 per cent of the ingot capacity of that state. Steel is made and shipped nationally. Regional consideration can lead to any result desired if sufficient care is taken in selecting or limiting the region.

The appellant ignores the fact that after a thorough study of the problem a responsible Government official considered that it was doubtful that a sufficient outlet for its products could be secured to operate a 1,283,400 ton steel plant at Geneva, Utah (R. 299); that U. S. Steel was the only bidder complying with the bid requirements that was willing to purchase and convert the plant to peace-time production without government aid (R. 674-677); and that after much urging by government officials and others it finally consented to make the attempt in the hope of being

[1] Included in the term "Far West" are the states of Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, Montana, Wyoming, Colorado and New Mexico.

able to provide a sufficient outlet for a break-even operation until the industrial development of the West, stimulated by that operation, should enable it to make a fair return on the investment of its stockholders' money in the undertaking (R. 371-375).

The types and quantities of products made by U. S. Steel in its relationship to competition involved here will be discussed below.

III.

The purpose of United States Steel in entering into the contract.

U. S. Steel designed, constructed and operated for the Government, without fee or charge, a steel plant at Geneva, Utah, as a war project for the construction of ship plates and structurals (Fdg. 39, R. 47; 295-297). In the early part of 1945 it considered the purchase or lease of the plant, but, because of the speculative nature of the venture and the opposition both within and without the Government to a purchase or lease by an eastern steel company, it decided not to undertake it. On August 8, 1945, it notified the Defense Plant Corporation that it was not interested in the purchase or lease of the property (Fdg. 39, R. 47; R. 297).

On September 4, 1945, the Surplus Property Administrator wrote Benjamin F. Fairless, President of U. S. Steel, advising him that the Reconstruction Finance Corporation and Surplus Property Administration "would be happy to consider any offer by U. S. Steel to lease or purchase the Geneva plant" (Fdg. 40, R. 47, 297-298).

On October 9, 1945, the Surplus Property Administrator submitted to Congress his report on the disposition of government-owned iron and steel plants and facilities. He stated that particular interest had been focused on the disposal of the Geneva steel plant; that 27 of the country's 30 integrated steel companies capable of producing at least 300,000 net ingot tons per annum had been approached by

Reconstruction Finance Corporation to determine whether they were interested in the lease or sale of the plant; replies were received from all but two of the 27 companies and all of the replies were in the negative; that the remaining three integrated companies had previously shown an interest in the plant, two of them to lease the property with necessary additions to be paid for by the government and the third, U. S. Steel, to lease or buy the property (Fdg. 41, R. 47; R. 296-299).

The administrator also referred to the notice given by U. S. Steel to Defense Plant Corporation that it had decided to take no further action toward the acquisition of the plant because of problems involved in establishing it as a sound and successful commercial enterprise and because of statements by government officials which in practical effect appeared to U. S. Steel to rule it out as a prospective lessee or purchaser, and that the Administrator's position relative to U. S. Steel was indicated by his letter of September 4, 1945 to Mr. Fairless (Fdg. 41, R. 47, R. 297-299).

The Surplus Property Administrator and his successor the War Assets Administrator considered that the peacetime operation of the Geneva plant was of paramount public importance but that there might be limited possibilities for its "post-war competitive operation" and that "the development of sufficient market outlets to justify continuous operation involves considerable risk" (R. 295, 299, 625).

Following a great amount of pressure upon Mr. Fairless and other officials of U. S. Steel by various people in and out of the government, a new study was made of the situation and, as a result of this subsequent re-examination, a bid was submitted (Fdgs. 43, 44, R. 48; R. 371-373; Defs'. Ex. 64, R. 624).

The bid pointed out that the Geneva plant had a rated ingot capacity of 1,283,400 tons, a plate capacity of 700,000 tons and a capacity of 250,000 tons of structural shapes and stated that, if U. S. Steel acquired the property, it

proposed to install necessary facilities for the production of 386,000 tons of hot-rolled coils annually which would be utilized in the cold reduction mill that is being installed at the Pittsburg, California, plant of Columbia (Defs'. Ex. 64, R. 655, 657).

U. S. Steel offered $47,500,000 for the Geneva plant and the inventories. The bid contemplated that U. S. Steel would spend not less than $18,600,000 at the plant for required changes and new facilities and that a cold reduction mill to utilize Geneva produced steel would be erected at Pittsburg, California, at a further cost of $25,000,000 (Defs'. Ex. 64, R. 659).

On May 24, 1946, the Surplus Property Subcommittee of the Committee on Military Affairs of the Senate published a letter dated May 23, 1946, from the Director, Office of Real Property Disposal, War Assets Administration, advising that the Price Review Board had acted favorably on the recommendation to accept the bid of U. S. Steel and that award of the Geneva steel plant was accordingly being made to U. S. Steel (Fdg. 47, R. 48-49, Defs'. Ex. 65, R. 663, 664).

Acceptance of the bid was recommended, among other reasons, because it would.

> "assure the most effective use of the Geneva steel plant for war purposes and common defense"
>
> "foster postwar employment opportunities not only in the Geneva steel plant but also in the steel-consuming industries in the West"
>
> "It will foster the development in the West of a new independent enterprise"
>
> "It will obtain for the Government, as nearly as possible, a fair value of the Geneva steel plant"
>
> "It offers the highest possible degree of assurance for the continued and perpetual operation of the plant"
>
> "It ends all future financial responsibility of the Government for the Geneva steel plant" (Fdg. 47, R. 49-50, Defs'. Ex. 65, R. 662, 668-670).

On June 17, 1946, the Attorney General advised the Administrator that he did not view the sale of the Geneva plant to U. S. Steel as a violation of the anti-trust laws (Fdg. 48, R. 50; Defs'. Ex. 66, R. 679-683).

Geneva Steel Company, a subsidiary of U. S. Steel, took possession of the Geneva steel plant on June 19, 1946 (Fdg. 49, R. 50). Officials of U. S. Steel then set about devising ways to provide sufficient production to assure its successful operation (Fdg. 49, R. 50-51). During the summer of 1945, U. S. Steel had decided to install a cold reduction mill at its Pittsburg, California, plant which would require 386,000 tons of hot-rolled coils for cold reduced tin plate and sheets (R. 374). U. S. Steel had expected that these coils would be obtained from the Birmingham plant of Tennessee Coal, Iron and Railroad Company, another subsidiary of U. S. Steel, and that they would be shipped by water from the port of Birmingham on the Warrior River to Mobile and thence by water to Pittsburg, California (R. 317-318, 374). The chief engineer of U. S. Steel of Delaware advised that it would be much more economical and profitable for Columbia to acquire the hot-rolled coils from Birmingham rather than make a very large additional investment at Geneva for that purpose (Finding 49, R. 50-51; R. 318). Nevertheless, in submitting its bid for the Geneva plant, U. S. Steel agreed to divert the hot-rolled coil load from Birmingham in order to provide a base load for Geneva and this subject was the first one considered by U. S. Steel officials following acquisition of the Geneva plant (R. 319, 651).

It is well at this point to consider U. S. Steel's competitive position in its West Coast structural fabricating business.

Structural fabricated products consist of buildings, bridges and other permanent structures and are made principally from rolled steel shapes which are sheared, punched, drilled, assembled and riveted or welded together to form such structures (Fdgs. 5, 6, R. 36, 145). U. S.

Steel does not make or sell fabricated tanks, pipes, penstocks or other fabricated plate products, which are made principally of steel plates and do not have facilities for such work (Fdg. 7, R. 36, 145-148).

U. S. Steel has no structural fabricating plants west of the Mississippi River and all of the structural steel products which have been sold to western customers have been fabricated in eastern plants and shipped to West Coast destinations (Fdg. 7, R. 36, 141, 142). However, several factors have combined in recent years to make it progressively and increasingly difficult for U. S. Steel to continue to compete in the West with western fabricators. One of the most important of these factors has been the substantial increases in freight rates which have been made over the past few years. (On the long haul from eastern fabricating plants to West Coast destinations, freight charges become an important element of cost that give to the western fabricating plant a decided competitive advantage.) These rates have now been increased to a point that they impose on the eastern plants a serious cost burden from a competitive standpoint in the case of most fabricated structural steel products. As an example of these increases, the commercial freight rate on a ton of fabricated steel from Gary, Indiana, to West Coast points had been raised from $20.10 in 1937 to $25.54 at the time of the hearing (Fdg. 30, R. 45; Defs'. Ex. 36, R. 588). Further increases have subsequently occurred.

Another adverse factor has been the abolition of land-grant freight rates (R. 167, 218). Previously these rates applied on shipments to governmental agencies and substantially reduced delivery costs of fabricated products to western destinations as is apparent from the fact that the approximate land grant rates from eastern fabricating plants to various western destinations were from $8.10 to $13.40 per ton under the commercial rates (Fdg. 28, R. 44; Defs'. Ex. 35, R. 588). During the ten-year period from 1937 to 1946, 62.5 per cent of the total shipments of fabri-

cated structural steel made by U. S. Steel to western consumers went to government agencies (Finding 28, R. 44; R. 195). Thus, the abolishment of land grant freight rates became equivalent to an increase in the cost to U. S. Steel of making delivery to government agencies at western destinations of from $8.10 to $13.40 per ton and radically altered its competitive position in the western states.

A further factor which has increased the competitive disadvantage of U. S. Steel's eastern fabricating plants is the operation of the Geneva steel plant which makes available to West Coast fabricators steel plates and shapes at a lower relative price than previously. This results in delivered costs on fabricated steel products, considering steel and transportation costs, at West Coast points, of about $12.65 per ton less than the cost of such products to eastern fabricating plants, plus transportation costs on the fabricated steel to West Coast destinations (Fdg. 31, R. 45; R. 200). This difference of $12.65 per ton exceeds the profit which U. S. Steel is able to earn on such products (Fdg. 32, R. 45; R. 200, 201).

The cumulative effect of these competitive disadvantages has now eliminated U. S. Steel from the western market except for the largest and most complicated structures and specialized type of fabricated products which it is equipped to fabricate economically and which sell at higher prices that minimize transportation charges in relation to total costs (Fdg. 32, R. 45; R. 199-201).

U. S. Steel had been fully aware of these mounting difficulties for some time and had recognized several years before that it could not hope to continue to compete successfully in the western states in the sale of fabricated structural steel products which were made in eastern fabricating plants. Tentative plans for plants in Los Angeles and San Francisco had been formulated prior to the war. However, the war came along and the matter was deferred (Fdg. 33, R. 45; R. 375, 376). While U. S. Steel had deferred the problem of building or acquiring West Coast

fabricating facilities in order to remain competitive in that market, the purchase of the Geneva steel plant from the government on June 19, 1946 brought the matter to a point where action was required (Fdg. 49, R. 51; R. 379).

Mr. Fairless testified that his staff advised him that Geneva must have a fabricating outlet to protect and give it backlog tonnage for its structural mill (R. 375) and that "it was perfectly obvious to me from the beginning, as it must have been to any steel man, that if we acquired Geneva we must have fabricating facilities" (R. 379). It was then decided that U. S. Steel must either build fabricating facilities or acquire existing facilities (R. 375, 379). The possibilities of building two fabricating plants on the Pacific Coast, one at Los Angeles and one at San Francisco, were again investigated and tentative sites were actually selected (R. 319). Also, Mr. Fairless recalled a suggestion, first made to him by Mr. Roach, President of Consolidated Steel Company, in the fall of 1945 and repeated early in 1946, that Consolidated's plants were for sale and it was decided to investigate its properties. Such an investigation was made during the month of August, 1946 (Findings 50, 53, R. 51, 52; R. 342-343, 377-379). As a result of that investigation, U. S. Steel estimated that it would probably cost at present prices about $14,000,000 and take three years to build plants such as Consolidated owned; that Consolidated's properties had a depreciated value of $9,800,000 and it would be necessary, if U. S. Steel were to acquire them, to spend about $1,000,000 to make changes that would be considered advisable (Fdg. 53, R. 52; R. 323).

After negotiations, agreement was reached for the purchase of the properties by Columbia for about $8,250,000 (Fdg. 54, R. 52; R. 323, 324).

Mr. Alden Roach, President of Consolidated Steel Company, testified that he believed it would benefit the shareholders of Consolidated if its facilities and physical assets were sold so that they could realize upon the equity that had been built up for them rather than risk such equity in

a more or less uncertain future; that if he could do that and make a transaction with a strong company with good management, he could do a service for the employees in the assurance of continued employment and also a community service that would be beneficial (Fdg. 50, R. 51; R. 342).

Before approaching U. S. Steel, Mr. Roach had considered the possibility of selling Consolidated to Bethlehem Steel Company and had some preliminary negotiations with Bethlehem. He had also been approached by a representative of the Kaiser Company concerning the possibility of an affiliation with the Kaiser Company (Fdg. 51, R. 51; R. 350-351). Prior to the war, the subject had been discussed with a representative of the Republic Steel Company (R. 351).

The intention of Consolidated to sell its business and properties is apparent and had they been sold to another producer of rolled steel products, U. S. Steel would, of course, have lost the tonnage which it had long supplied to Consolidated. That tonnage was particularly important to the Geneva plant, which required additional tonnage for the operation of its mills over and above the 386,000 tons of hot rolled coils assured to it by the transfer from Birmingham (R. 317-319).

This accounts for the statement quoted at page 37 of appellant's brief that

> "it is believed, that United States Steel could continue to compete for the business of Consolidated *so long as such business is available.* There would, however, be no assurance that such business would be obtained by United States Steel and such assurance is the objective of the proposed acquisition". (Emphasis added.)

Mr. Fairless testified that he did not have the slightest thought, intent or purpose to restrain trade and commerce, to eliminate competition or a competitor or to monopolize in any respect (R. 380), to prevent anybody from selling anything, and that his one and only motive was "to secure sufficient backlog to operate the newly acquired Geneva

steel plant on a successful basis from the standpoint of furnishing satisfactory employment to almost 6,000 employees and also fulfilling the obligation which we had made to the Government and to the citizens of the West that we would, to the best of our ability, operate that plant successfully and in the interests of building up the industrial west. That was the only objective that I had at that time, and the only one I still have" (R. 381). The District Court so found as above stated (Fdgs. 56-57, R. 52).

The above facts are undisputed. All point to the single purpose testified to by Mr. Fairless and found by the District Court.

IV.

Rolled Steel Products.

The complaint alleges that the "necessary effect of the purchase agreement will be to eliminate substantial competition in the sale of rolled steel products". Consolidated is not a producer of rolled products.

We reserve for the argument the question whether in the absence of a purpose to monopolize the sale of rolled steel products, which was not alleged or proved but was affirmatively disproved, the contract was within the purview of the Sherman Act in respect of its effect on purchases by Consolidated. The District Court did not pass on that question because "the subject matter of the suggestion lacks substantiality" (R. 59).

The Trial Court found that:

> "The rolled steel requirements of Consolidated represent a small part of the consumption of rolled steel products in the 11 states constituting the Consolidated market. The evidence fails to show that the acquisition of the business and assets of Consolidated by Columbia will injure any competitor of U. S. Steel subsidiaries which produces and sells rolled steel products or impair the ability of such competitor to compete with U. S. Steel subsidiaries in the production and sale of rolled steel products in the Consolidated market or elsewhere or otherwise restrict or suppress in any way

competition in the production or sale of rolled steel products in the 11 states of the Consolidated market or will, in any way, be detrimental to the public interest. The business now owned by Consolidated is not a substantial market for the rolled steel products of producers which are selling such rolled steel products in competition with Columbia Steel Company and other wholly-owned subsidiaries of U. S. Steel." (Fdg. 16, R. 39)

These are the facts:

(1) For five peace-time years, 1937-1941, Consolidated bought ¼ of 1 per cent of total production of rolled steel products (Fdg. 11, R. 37).

(2) For ten years, 1937-1946, Consolidated bought 4/10 of 1 per cent of total national production of rolled steel products (Fdg. 10, R. 37). This includes tonnage purchased and paid for by U. S. Maritime Commission (Ptfs'. Ex. 2, R. 510).

(3) Consumption of rolled steel products in the Consolidated market for five years, 1937-1941, was 21,009,647 tons of which Consolidated purchased 498,270 tons, or less than 2.4 per cent. (Fdg. 10, R. 37, 271).

(4) Consumption of rolled steel products in the Consolidated market for ten years, 1937-1946, is estimated at 62,443,775 tons of which Consolidated purchased (including maritime tonnage) 2,036,635, *or* 3.3 per cent (Fdg. 10, R. 37, Defs'. Ex. 43, 44, R. 594, 595).

(5) U. S. Steel has supplied Consolidated varying amounts, which average about one-half of its tonnage for both periods (Defs'. Ex. 44, R. 595).

(6) In 1940 there were nine major steel companies, exclusive of U. S. Steel, which supplied Consolidated's requirements. Their combined sales to Consolidated were 3/10 of 1 per cent of their combined total sales. In 1946 for eleven suppliers the comparable figure is

16/100 of 1 per cent (Fdg. 15, R. 38; Defs', Ex. 63, R. 622, 623). Examination of the evidence will disclose the effect on individual suppliers none of whose sales are affected by as much as 2 per cent with a slightly higher percentage in one instance (3.7 per cent) based on its estimated production.

Even if it be assumed (it, of course, has not been and cannot be proven) the other suppliers of Consolidated would suffer a net loss of the full amount of their business with Consolidated, the amounts involved are trivial and can have no possible effect as a restraint on competition.

The appellant ignores the fact that the operation of the Geneva plant, further to assure which the purchase contract was made, is already expanding and will continue greatly to expand the western market for rolled steel products by its encouragement to steel-consuming industries to locate in the West (this has already begun, R. 399) and that no competitor is excluded from the market.

Appellant claims the post-war situation of Consolidated is different and cites data for 1946. In that year Consolidated was finishing up its war contracts and its commercial business constituted about 16 per cent of its total sales (Defs'. Ex. 60, R. 615). It purchased during the year 83,846 tons of steel products from U. S. Steel and 94,823 tons from other producers and suppliers. These purchases from U. S. Steel were less than 6/10 of 1 per cent of its total production and the purchases from other producers and suppliers were less than 3/10 of 1 per cent of total industry production, exclusive of the production of U. S. Steel. Consolidated's total purchases of 178,669 tons during 1946 were less than 4/10 of 1 per cent of industry production (Fdg. 12, R. 38; Defs'. Ex. 38, 39, 44, R. 590, 591, 595). In 1946 estimated consumption in the eleven states of rolled steel products was 6,000,000 tons and Consolidated's purchases aggregated 178,669 tons or less than 3 per cent of the total estimated consumption in the eleven states (Fdg. 13, R. 38; R. 271).

Appellant also undertakes to show that West Coast steel-producing plants supply the bulk of Consolidated's requirements. Appellant says that 95 per cent of Consolidated's purchases from U. S. Steel come from Columbia, the inference being that Columbia produces the materials on the West Coast. It sets forth on page 15 of its brief a table showing "Purchases from West Coast Producers" of 540,218 tons out of Consolidated's total purchases of 676,-939 tons. The West Coast producers listed by appellant on this table are Bethlehem Steel Company, Columbia and Kaiser Co.

Columbia is, of course, a West Coast producer with two small mills at Pittsburg and Torrance that have an aggregate ingot capacity of 579,800 tons per year. The Torrance mill produces hot rolled sheets, medium and light structural shapes, merchant bars, reinforcing bars and steel castings. The Pittsburg plant produces sheets, bars, tie plates, wire rods, wire and wire products, wire rope and steel castings (R. 651). Note that plates are not listed. Columbia acts as West Coast distributor for the products of the other U. S. Steel subsidiaries (R. 20). This much is shown by the record. However, appellant's unfounded assertions make it necessary to add that, while Columbia made the actual sales to West Coast customers, most of the steel it sold was produced by the mills of the other subsidiaries. Its own limited production of a few steel products falls far short of meeting the requirements of its customers. In the case of Consolidated, more than 60 per cent of the steel products which it purchased from Columbia during the year 1937 through 1941 were produced in eastern mills by other subsidiaries of U. S. Steel. This is in addition to the 5 per cent figure stated by appellant (App'ts. Br. p. 15).

Bethlehem Steel Company has three mills, one at Los Angeles with a reported ingot capacity of 213,000 tons, producing shapes, bars, nuts, bolts, rivets, spikes and forgings, another at South San Francisco with a reported ingot

capacity of 235,000 tons, producing shapes, bars, reinforcing bars, bolts, nuts, spikes and rivets, and a third at Seattle with a reported ingot capacity of 210,000 tons, producing shapes, bars, tie plates, universal plates, reinforcing bars, track spikes, bolts, nuts and rivets. From this it may be assumed that Bethlehem also shipped a large part of Consolidated's purchases from its eastern mills.

Further, with reference to appellant's statements about West Coast producers, Defendants' Exhibit 44-A on page 595 of the record shows that during the year 1937 through 1941 Consolidated purchased 251,039 tons of plates, or 50.4 per cent of the total of 498,270 tons of rolled steel products which it purchased during those years. No plates of the type used by Consolidated were produced by West Coast mills before the war and that entire tonnage, constituting 50.4 per cent of its total purchases, must have been shipped from Eastern mills. Also, Consolidated used considerable quantities of wide-flange, heavy structural sections that are not made in the West.

Plaintiff's Exhibit 2 (R. 511-514) shows purchases of rolled steel products by Consolidated 1937-1946. 57 different suppliers are listed, including two government agencies selling surplus stocks. Aside from minor suppliers, there were about twenty-two important steel producers of rolled steel products, including U. S. Steel and Bethlehem. All of the other important steel producers were eastern companies except Colorado Fuel & Iron Company and Kaiser Company.

The appellant's statement on pages 14 and 15 of its brief that

> "The geographical location of the producing plants with reference to Consolidated's plants, which are nearly all in California, is a factor of decisive importance. The importance of this geographical factor, recognized and admitted by U. S. Steel as a prime reason for this acquisition, was wholly ignored in the comparison made by the district court" (Appt's Br. pp. 14-15).

simply is not true. But the appellant's error does emphasize the sound evidentiary basis of the Court's findings.

On page 16 of its brief, the appellant attacks Finding 15 of the Trial Court, first, on the ground that the total sales of the companies named on Defendants' Exhibit 63 (R. 622, 623), on which the Finding is based, do not even approximate their total sales of rolled steel products. Such a statement, not supported by the record, is unwarranted. This criticism lacks conviction when dealing with data of a large number of companies, generally accepted as composing the steel industry and the primary business of which is to manufacture rolled steel products. There was no way to make the segregation, and it would have made no significant change in the result.

Appellant also says that most of the companies were not major suppliers of Consolidated. This is best answered by noting the sales of each company as shown on Defendant's Exhibit 63 (R. 622, 623).

The mills of all of the companies listed in Defendants' Exhibit 63 are located east of the Mississippi River, except the mill of Colorado Fuel and Iron Corporation at Minequa, Colorado, the mill of Kaiser Co., Inc., at Fontana, California, and the three small mills of Bethlehem on the West Coast.

All told 55 different concerns have supplied rolled steel products to Consolidated (Ptfs. Ex. 2, R. 513, 514). It is not possible that any of them can sustain any competitive disadvantage or harm from the proposed purchase.

Appellant next questions on page 16 of its brief the accuracy of Finding 13 (R. 38) of the District Court by questioning Defendants' Exhibit 43 (R. 594) on which it is based. That Exhibit 43 is a reliable estimate may be assumed from the facts that the tabulations were prepared by Ford, Bacon & Davis and that the estimated figures for the years 1940 through 1946 compare reasonably with the figures published by the National Resources Planning Board for 1937 and with those contained in Senate Report 199, part 3,

79th Congress, for the years 1937 through 1940. Neither at the trial nor in its brief did appellant question the specific figures; it only complains about what it calls a large element of conjecture and hypothesis (Appt's. Br. p. 17) entering into the computation. Giving full allowance for any hypothesis, the fact remains that Consolidated's purchases of rolled steel products represent only a very small share of the total consumption of such products in the West.

Elsewhere, appellant cites with approval National Resources Planning Board 1937 figures on plate and shape consumption (Appt's. Br. p. 17). The National Resources Planning Board report showed consumption of 4,362,900 tons of steel products in the Consolidated market in 1937 (Def's. Ex. 43, R. 594). Therefore, Consolidated's purchases were only 2.37 per cent of the total. Appellant can take no exception to this computation, and we believe it is a complete answer to its contention that the Court's finding of an estimated 2.4 per cent of purchases by Consolidated of all steel products sold in the Consolidated market during the 1937-1941 period is based upon conjecture and hypothesis.

There is no question that in 1937 the estimated consumption of plates and shapes in the Consolidated market totaled 562,600 tons and Consolidated consumption was 72,798 or 12.9 per cent. Before any conclusion can be drawn, however, as to the effect on competition by singling out two rolled steel products some analysis would have to be made of these products in relation to supply and suppliers. Merely examining these products separately would show that Consolidated's plate consumption must be compared with total production and that it is less than 2 per cent of the total, since no plates such as are used by Consolidated were produced in the Consolidated market in 1937. The structural consumption of Consolidated in that year, considered alone, was only about 9 per cent of the total consumption in the Consolidated market (Defs'. Ex. 42, 44A. R. 593, 595).

Moreover, the appellant's use of the estimates for 1946 are both fallacious and exaggerated (Appt's. Br. pp. 17, 18). First, the estimate of 440,000 of total consumption was, of course, intended for normal years and was for only seven of the western states. It compares with the above figure for the eleven states of 562,600 tons for 1937, which appellant used in making its first comparison. Second, the appellant has again used Consolidated's total purchases for 1946 despite the fact that only 16 per cent of Consolidated's business in that year was commercial work (Defs'. Ex. 60, R. 615), the balance being work done to complete war contracts, as we have hereinbefore pointed out. This war work would account for Consolidated's large purchases of plates and shapes in 1946, amounting to 107,128 tons and 43,770 tons respectively, and such purchases should be compared with the normal yearly average of 50,208 tons of plates and 25,602 tons of shapes which Consolidated purchased during the period 1937 through 1941 (Defs'. Ex. 44A, R. 595). For further discussion on this point see *infra* pages 65-66.

The final point made by appellant on this subject, which it has entitled in its brief "The Restraint on Commerce in Rolled Steel Products", is that Consolidated's importance as a consumer of rolled steel products is shown by the fact that its purchases from U. S. Steel subsidiaries have been far in excess of any other such fabricator. In this instance, the lack of support for appellant's statement is fully demonstrated by the record.

Appellant's statement is based upon Plaintiff's Exhibit 28 (R. 562), which consists of a list of the twenty largest fabricators on the Pacific Coast, who are potential customers of U. S. Steel, and the approximate tonnage which each has purchased from Columbia. It shows that Consolidated has purchased much larger quantities of steel products from Columbia than any of the other fabricators. The only significant thing about the list is that it shows that Consolidated is an important customer of Columbia.

It does not show that Consolidated is the largest consumer of steel products among the twenty largest fabricators, to say nothing of other steel buyers in the West. The list shows that all of the twenty fabricators except Bethlehem are buying some of their requirements from Columbia, but it does not show the quantities of steel products that they are buying from other suppliers and gives no hint of their size or importance.

V.

Extent of competition between Consolidated and U. S. Steel.

Appellant's more comprehensive attempts in the Trial Court to show competition have been reduced to two areas. It now relies upon competition in the sale of two lines of products, namely, fabricated structural steel products and pipe.

A. *The Nature of the Fabricating Business.*

It is essential to an evaluation of the extent of competition between U. S. Steel and Consolidated that the steel fabricating business, which is the sole business of Consolidated, be understood. The fabricator of steel products and the manufacturer who makes them by a repetitive, mass-production process for sale through the usual channels of trade to the ultimate consumer must be distinguished.

The structural steel fabricator has a plant equipped to cut, punch, form, assemble and rivet or weld together the steel framework of buildings, bridges and other structures, steel towers for electric transmission lines, radio towers or any other article made principally out of structural steel shapes (R. 145-148, 401-403).

The plate fabricator has a plant equipped to shear, bend, assemble and rivet or weld together the steel parts necessary to make tanks of all kinds, pressure vessels, pipe for

pipe lines, and other articles made principally of steel plates (R. 145-148, 401-403).

Fabricating plants differ greatly in size, type and kind of equipment, and smaller plants are limited in the size and type of jobs they can handle. Very few fabricators in the country have plants large enough, and have the type and size of equipment required to fabricate the steel for the Empire State building or the trans-bay bridge at San Francisco. The fabricator is a contractor, like the construction contractor, and he bids for the jobs he is able to handle on a competitive basis.

The steel fabricator makes no products for stock. Fabricated steel products are made to order. If a customer wishes to buy a hot-water tank for his home in a size not made by the manufacturers of such tanks, or if he wishes any other type of fabricated article, he may have anything he wants made to his own design and requirements by a fabricator. The product will cost him more money because it will be specially made instead of being produced by a repetitive manufacturing process geared to mass production at low cost.

Consolidated is in both the fabricated structural steel business and the fabricated plate business (R. 332). It has one medium-sized and one small structural fabricating plant and several small plate plants in the West. U. S. Steel has no fabricating plant west of the Mississippi River (R. 141).

U. S. Steel is in the fabricated structural steel business. Its plants are not equipped to fabricate plate products (R. 148) and it is not in the plate fabrication business.

B. *Extent of Competition in the Sale of Structural Steel Products.*

The following information discloses the extent of the competition that has existed between U. S. Steel and Consolidated:

1. For ten years, 1937-1946, American Institute of Steel Construction industry bookings were 14,610,121 tons of which U. S. Steel booked 2,796,688 tons or 19.9 per cent and Consolidated booked 146,270 tons or about 1 per cent.[1]

2. Data for six years, 1937-1942, is available nationally and in eleven states. Nationally, it shows a total of 9,997,880 tons of which U. S. Steel's bookings in the eleven states were 283,825 tons or 2.84 per cent. Consolidated's bookings for the same period in the same states was 84,533 tons or only 85/100 of 1 per cent of the total.

3. A.I.S.C. reported bookings for six years in eleven states of 1,665,698 tons of which U. S. Steel had 17 per cent and Consolidated had 5.1 per cent, but as will be shown, this was not a measure of competition.

4. Out of 1,665,698 tons booked, U. S. Steel bid on 632,398 or 38 per cent and was awarded 283,825 or 17 per cent. Consolidated ' 'd on 297,503 tons or 17.8 per cent and was awarded 84,533 tons or 5.1 per cent—again not a measure of inter-company competition.

5. For ten years U. S. Steel bid in the Consolidated market on 2,409 jobs of 1,273,152 tons and was awarded 839 jobs of 499,605 tons.

6. Consolidated was awarded only 35 jobs for 24,162 tons or 1.9 per cent of the total tons on which U. S. Steel bid.

7. Consolidated and U. S. Steel bid against each other in ten years on a total of only 166 jobs or 1.9 per cent of the combined total of 8,620 jobs bid by the two companies.

For the testimony and exhibits proving these statements see pages 271-274, 600, 601, 607 and 609 of the record.

Consolidated actually competed for 6,377 fabricated

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(1) (A.I.S.C. type of fabricated structural steel product is 86 per cent of the total and non-A.I.S.C. type about 14 per cent of U. S. Steel's total output.)

structural steel jobs during this period involving 578,847 tons. U. S. Steel competed for 2243 jobs of 1,150,798 tons for which Consolidated did not compete, and Consolidated competed for 6,211 jobs of 456,494 tons for which U. S. Steel did not compete. The basic reason for this absence of competition between Consolidated and U. S. Steel is easily explained. Light-weight, simple types of fabricated steel products can be fabricated economically by the smaller fabricating plants and are generally sold locally at relatively low prices. The larger fabricating shops are equipped to fabricate economically the specialized, completed types of fabricated steel products that the smaller plants are for the most part unable to handle. The competition for each type of fabricated steel product involves variable factors, such as design, weight, size of sections, availability of plant and equipment of the type and size required, and the ability of the fabricator to perform the job generally (Fdgs. 17 and 18, R. 39; R. 158-159). There are also the reasons relating to plant location and freight rates, previously discussed.

It is to be noted that the jobs awarded to Consolidated averaged 67 tons, whereas the jobs awarded to U. S. Steel averaged 596 tons (Fdg. 26, R. 44).

Consolidated's total fabricating business during the ten-year period ending in 1946 was 1,002,363 tons, of which its structural business was 16 per cent and the business secured in competition with U. S. Steel was 2.4 per cent (Fdg. 25, R. 44).

The only conclusion that can be drawn from this evidence is set forth in the District Court's ultimate Finding 27 (R. 44) which reads as follows:

> "The competition that existed during the ten-year period from 1937 to 1946 between Consolidated and the U. S. Steel subsidiaries in the manufacture and sale of fabricated steel products was not substantial."

Appellant attempts to make much of the fact that Con-

solidated made bids and obtained awards in each of twleve classifications of structural steel products shown by Defendants' Exhibit 56 (R. 610-611). Of course, each classification contains many variations of structures for individual projects. It is the nature of the particular job, together with many other factors, which determines the competition for the job. The fact that Consolidated bid on one of ten jobs in a particular classification is no indication that it was either able or willing to bid on any one of the other nine jobs in the classification. Even a casual examination of the data shows that U. S. Steel had many important competitors who were able to compete on the type of jobs upon which U. S. Steel bid and that Consolidated was clearly a negligible factor.

Appellant's claim that one of the companies captured 40 jobs and the other 35 jobs out of 166 jobs on which they both bid during the ten year period "indicates how serious a diminution of competition there would be if either company absorbed the other" could be made with equal effect if the bidding had occurred on 15 jobs averaging under 10 tons each and one company had been the successful bidder on 8 jobs and the other on 7 jobs. It is only by looking at the picture of competition as a whole that any judgment can be made as to the relative extent of competition or of injury to it.

The basic question is the extent of competition after the acquisition. The Trial Court found that competition in the sale of fabricated structural steel products in the Consolidated market is active and vigorous and may be expected to continue to be active and vigorous upon acquisition of the business and assets of Consolidated by Columbia (Fdg. 38, R. 46-47).

The Plaintiff's Exhibit 33 (R. 565) lists 90 concerns that booked fabricated structural steel tonnage in the Consolidated market in 1946.

Defendants' Exhibit 1 (R. 579) is a list of the 99 principal structural fabricators in the country. 59 of these have com-

peted with U. S. Steel for business in the Consolidated market and 23 have plants located in that market.

Defendants' Exhibit 2 (R. 582) is a list of 45 additional structural fabricators who are located in the Consolidated market.

Defendants' Exhibit 3 (R. 583) is a list of additional fabricators located outside the Consolidated market who have competed with U. S. Steel for business within that market.

Bethlehem Steel Company is the principal competitor of U. S. Steel and secures about the same percentage of the fabricated structural steel business as it does (R. 201, 202, 237). It also makes and sells fabricated plate products (R. 237). Bethlehem has large eastern fabricating plants and also has fabricating plants at Los Angeles, San Francisco and Alameda, California (Defs. Ex. 1, R. 579). It is the most important and aggressive structural competitor of Consolidated (R. 336) and every other fabricator on the West Coast, and is able to supplement the work which it is able to do in its western plants by fabricating the more difficult and complicated parts in the East (R. 201). The appellant's repeated assertions that U. S. Steel was first and Consolidated second were based on testimony and exhibits which were rejected by the trial judge, as above stated.

The further point is made that each company obtained the award on a much higher percentage of the jobs on which the other did not bid than on the jobs on which both bid. This, as pointed out, is explained by the kind of business that each was engaged in and the kind of jobs in which each was interested. Moreover, this is such a small number of jobs in relation to the total on which each bid that it affords no basis whatsoever for comparison.

Appellant further indicates the lack of competition between the two companies by pointing out that U. S. Steel secured only 30 per cent of its business in the Consolidated market in the State of California, while 75 per cent of Consolidated's business was in California, thus demonstrating

that within the eleven state area (a market selected by appellant) not only were different types of work competed for by the respective companies, but that such negligible competition as did exist can be narrowed by geographical factors.

The appellant sees in 1946 a significant decline in the bookings of the U. S. Steel subsidiaries and a significant increase in the bookings of Consolidated, and develops percentages based on tonnages actually so booked to make its point. Appellant developed on cross-examination of the President of Consolidated that there is a substantial difference between the bookings and shipments of a fabricator because he might, for example, book all of his business for two years in one month (R. 403). It is quite obvious that in a time of abnormal demand such as has existed since termination of the war, a fabricator would more than likely accept business to the full extent of his ability to make deliveries over as long a period of time as his customers could be induced to wait. The President of U. S. Steel testified that there exists today the most extraordinary peace-time demand for steel that has existed in his 33 years in the steel business and that it does not represent the peace-time rate of operation or demand for steel (R. 392).

Apart from this extraordinary market situation, the appellant is on unsound ground in taking bookings for as short a period as one year for the purpose of showing the competitive situation of the fabricators.

Furthermore, appellant completely ignores the extent of the actual competition between the U. S. Steel subsidiaries and Consolidated in 1946. Defendants' Exhibit 62 (R. 620) shows that there were only 22 jobs on which both U. S. Steel subsidiaries and Consolidated bid. Eight of these for 5,028 tons were awarded to Consolidated and seven for 13,099 tons were awarded to the U. S. Steel subsidiaries. During the first eight months of 1946 (Consolidated's figures for the last four months were not available at the time of trial), Consolidated bid on 836 jobs for 74,522 tons and was

awarded 346 jobs for 28,481 tons (Defs'. Ex. 56, R. 611). The U. S. Steel subsidiaries bid on 251 jobs in the Consolidated market for 107,075 tons and were awarded 111 jobs for 46,707 (Defs'. Ex. 54, R. 607). Thus, Consolidated secured eight jobs on which U. S. Steel also bid out of 836 jobs bid, plus the additional jobs on which it bid during the balance of the year, and U. S. Steel subsidiaries obtained seven jobs on which Consolidated also bid out of a total of 251 jobs bid. In other words, they bid on a total of 1065 jobs, plus the number of jobs bid by Consolidated during the last four months, but competed on only 22. These comparisons clearly show that appellant's argument that there has been increased competition between U. S. Steel and Consolidated since the war is without foundation and is contrary to the facts.

On page 13 of its brief appellant states that Consolidated's backlog of commercial orders on November 30, 1946, was over $27,000,000. Appellant's counsel made this same error at the trial and despite the fact that his attention was directed at that time to allowances for accruals made against this item (R. 87), appellant persists in its mistake. The correct figure is $19,944,966 (Ptfs. Ex. 2, R. 508-510).

The abstracts of the bids submitted to the Bureau of Reclamation on 14 different projects (Ptf's. Exs. 14-27, R. 547-560) were the only evidence developed and offered in this case by appellant without the assistance of the appellees on the extent of competition between them, and there are several important considerations bearing upon their relevancy and probative value in relation to the questions presented in this proceeding.

First, the abstracts were hand-picked and cover a selected and irregular period of time from October 26, 1945, to January 7, 1947.

Second, they are limited to lettings on which both U. S. Steel and Consolidated bid and no showing was made whether or not they include all Bureau of Reclamation projects on which both concerns bid.

Third, ten of the projects were in 1946 and Consolidated bid on a total of 836 jobs in the first eight months of that year (Defs'. Ex. 56, R. 611).

Fourth, they are limited to a period of abnormal demand for steel products when government agencies have publicly protested their inability at times to obtain any bids on such products and it is well known that some, such as the Navy, were forced to abandon the practice of seeking competitive bids and negotiate their purchases.

Fifth, taking the first of the abstracts as an example, Plaintiff's Exhibit 14 (R. 547) is an abstract of bids for furnishing fixed wheel gates and hydraulic gate hoists for the Davis Dam at Louise, Arizona. The low bid figures \$345 per ton. The freight rate disadvantage of the U. S. Steel subsidiaries into Arizona is reduced and the higher price of the product reduces the relative importance of transportation costs (R. 158, 166, 224). The testimony shows that U. S. Steel is still able to compete for this type of business (R. 160, 198-201, 235).

Sixth, is the fact that all of these jobs were for the huge irrigation and hydro-electric projects which the government initiated before the war, including the Shasta, Grand Coulee, Friant, Davis and Keswick Dams. These projects are now completed and there is no evidence regarding future work or whether these companies can compete on it if it should arise.

That the competition in the fabrication of structural products which did exist was unsubstantial and inconsequential is demonstrated by unchallenged statistical data and oral testimony. Appellees, in order to present fully the competitive area, presented an analysis of the 2,409 jobs upon which U. S. Steel bid in the Consolidated market during the ten-year period (Defs'. Exs. 24-34, not printed). Not only were the factors affecting each job presented but the changing complexion of the competitive picture was fully demonstrated (R. 174-194). The abolition of land grant freight rates, the increase in regular freight rates, the operation of the Geneva steel plant and through such

operation the supplying of steel plates and shapes to West Coast fabricators at reduced prices, all tend as a practical matter to diminish even the slight competition which existed in the past (R. 194-201, Fdg. 34, R. 45).

The only conclusion that can fairly be drawn from the evidence is that the only competition in structural fabricating between Consolidated and U. S. Steel in the past has been unsubstantial and that, as a practical matter, even that competition has been eliminated by other causes.

Based on the evidence and its subsidiary Findings of Fact, the District Court made the following ultimate Findings:

> "36. * * * Competition in the sale of fabricated steel products in the 11 states is highly competitive and very extensive * * *" (Fdg. 36, R. 46).
>
> "38. Competition between Consolidated and the U. S. Steel subsidiaries is not substantial and its elimination will have no appreciable effect on the competition in the sale of fabricated structural steel products in the 11 states, which competition is active and vigorous and may be expected to continue to be active and vigorous upon acquisition of the business and assets of Consolidated by Columbia" (Fdg. 38, R. 46-47).
>
> "32. * * * and such a disadvantage in cost eliminates them (the U. S. Steel subsidiaries) from the West Coast market except for specialized products which they are equipped to fabricate economically and which sell at higher prices per ton of product, thereby reducing the transportation charges in relation to total costs" (Fdg. 32, R. 45).

C. *Extent of Competition in the Sale of Pipe.*

Beginning a discussion of pipe by stating, as appellant does, that National Tube Company, a U. S. Steel subsidiary, makes pipe ranging in size from 2 to 26 inches in diameter and Consolidated makes pipe ranging in size from 4 to 30 inches in diameter, leaves about as erroneous an impression as any statement could. This question of the kinds of pipe made and how made, with what material,

for what purpose, is fully discussed in the record (R. 278-282, 336-341).

A sheet of steel, bent into a cylinder and welded along the edges, may be a pipe entirely satisfactory for agriculture irrigation, but it cannot be used and does not compete with one of National Tube's pipes made of different type of material, with different wall thicknesses, in different lengths, by a different method for a different use, such as an oil well casing, even though the pipe may have the same diameter.

The products of the two companies are no more in competition than there is competition between a rubber boot and a bedroom slipper, although both may be said to be footwear.

National Tube had made many kinds of pipe for many years and has used and still uses two methods in the manufacture of such pipe. Its pipe, utilized for the transportation of oil and gas, has been made in recent years by the so-called seamless process. Other pipe manufacturers have used the seamless method or one of several types of electric welding processes in making pipe, starting with plate or skelp which is bent and shaped into cylindrical form and then is welded. National Tube abandoned the production of electric-weld pipe several years ago, scrapped its plant and sold some of the equipment to Consolidated, which has it in use at its Vernon plant (R. 288, 338).

National Tube manufactures both pipe and tubing. It produces its own steel ingots which it rolls into rounds and small plates. It then forges the rounds into wrought steel pipe and tubing, known as seamless pipe and tubing, in sizes from two inches to 26 inches, outside diameter, and in 40 feet lengths. It also makes buttweld pipe from small plates in sizes up to three inches in diameter (R. 278, 279). The seamless pipe is made in four general classifications: (1) oil country goods consisting of pipe and tubing for well casing and drilling, (2) standard pipe for plumbing, heating, refrigeration and other construction purposes, (3) line pipe for large oil, gas and other trunklines and for

miscellaneous uses, and (4) tubing specialties such as boiler tubes, steam tubes and automotive tubing (R. 278, 279). Buttweld pipe is made for use as standard pipe and miscellaneous line pipe (R. 279).

Consolidated manufactures low pressure, irrigation, light-walled pipe in sizes from 4 to 8 inches from steel sheets which are formed into circular sections and resistant-welded in a rough non-precision process (R. 336-337). It also makes from skelp, which is rolled into cylindrical form, low pressure electric welded pipe by the union melt fusion process in sizes from 18 inches up to such sizes as 62 inches in diameter and in 8, 12 and 30 feet lengths (R. 286, 337, 338). In normal times such pipe is used principally by the water industry (R. 337). Recently, Consolidated has fabricated heavier welded pipe for oil and gas lines (R. 360) and it is this activity that prompts appellant's argument that the two companies are competitive.

The facts pertinent to this case about the pipe for gas and oil lines are these:

(1) Consolidated, primarily a plate fabricator, is, at present, fabricating pipe for oil and gas pipe lines. National Tube Company is manufacturing seamless pipe for the same purpose. There the similarity stops.

(2) There are two economical and competitive methods of manufacturing high-pressure trunkline pipe for oil and gas pipe lines. One is the seamless method used by National Tube Company which starts with solid steel tube rounds as a raw material. These tube rounds are pierced, forged and rolled until a seamless tube results. There are five or six large competitors of National Tube Company that make seamless pipe (R. 286-289).

(3) The other is the electric-welded method. This method is used in three different ways by A. O. Smith, Republic Steel Company and Youngstown Sheet & Tube Company, and National Tube Company regards all three of these manufacturers as very stiff competition (R. 288).

(4) Consolidated uses neither method (R. 411). It first fabricates steel plates by expanding and cold working the steel to increase its yield point. It then shears and squares the edges and trims them with a groove to prepare for welding. Next, it rolls and shapes the steel into cylindrical form. The joint is then welded by the union-melt process or fusion method of welding (R. 337-338, 407). This more expensive fabricating method results in a price that is $30 per ton higher than the price paid for the pipe produced by the regular pipe manufacturers (R. 340).

(5) The President of Consolidated testified that the reason Consolidated is able to sell its pipe at $30 per ton higher price is that there is no pipe available and that, having exhausted the market, El Paso Natural Gas, for one, turned to Consolidated to make some pipe as an emergency for them (R. 340-341). That the only reason Consolidated was able to sell its pipe was that none of the pipe produced by National Tube, A. O. Smith or any of the other pipe manufacturers was available and that Consolidated is not able to sell its pipe for use in oil and gas pipe lines when the pipe of the regular manufacturers is available (R. 341).

(6) The regular manufacturers of line pipe by economical methods, and there are a number of them, being chock-a-block, pipe line buyers are willing to buy the pipe fabricated by Consolidated at the prices Consolidated is forced to charge because of its higher costs.

(7) To claim that Consolidated can overcome its cost disadvantage by obtaining additional emergency orders is to assume what has not been proven or even hinted at by the witnesses who testified (R. 287, 341). All the evidence is directly to the contrary that Consolidated will not be able to compete, not only with U. S. Steel but many other pipe manufacturers in normal periods.

(8) Such facilities as Consolidated has for fabrication of pipe are a comparatively small part of the plant and equipment for fabricating structural and plate products

that Columbia has contracted to purchase for upwards of \$8,250,000. This may be compared with the only estimate which appears in the record of a cost of \$11,465,000 of a modern mill for the manufacture of pipe (R. 645).

(9) The fact that in the case of an emergency, such as existed in the case of the El Paso-Los Angeles pipe line, the two companies and one other furnished separate parts of the line, does not prove they are competitive when the customers could not buy from the sources from which he usually buys pipe (R. 282, 341).

Appellant did not attempt to prove Consolidated was competitive with other manufacturers of welded or seamless pipe. It relies entirely upon the fact that Consolidated has been given pipe line orders at a time when the regular pipe manufacturers were unable to take the business. The very fact that Consolidated is now able to take that business (appellant says "very recently its business as a supplier of pipe for oil and gas lines has enormously expanded") is proof that it is not competitive in that field and normally has to rely on other outlets for its plate fabrication business. A horse-drawn hack in Central Park may be a perfectly acceptable means of transportation in an emergency but that is not to say that it is competition for a taxicab.

Appellant next says both U. S. Steel and Consolidated sell pipe for oil and gas lines and have supplied part of particular pipe lines (and it may be added, at \$30. a ton higher cost), *i. e.*, the El Paso gas line, the Southern Counties gas line and the Trans-Arabian pipe line (R. 360). It also supplied some pipe of this kind to Pacific Gas & Electric Company (R. 283). This constitutes all of the sales it has ever made of welded pipe for oil or gas transmission lines.

The recent Southern Counties and Southern California gas line initiated Consolidated into the business of making pipe for oil and gas lines and this type of fabrication is new to it (R. 360, 408).

Pacific Gas & Electric Company bought pipe for a gas line from National Tube but did not get enough to do the job. Rather than wait a year to get more pipe from National Tube, the Company bought pipe from Consolidated even though it cost about $30. more per ton (R. 282, 283).

The El Paso Natural Gas Company was unable to buy pipe from its usual sources and, in order to lay its line quickly, it is buying a portion of the pipe from Consolidated (R. 282). The Company bought approximately 230 miles of pipe from National Tube, 400 miles of pipe from one of its competitors and Consolidated is furnishing 100 miles of pipe at a delivered price some $31 per ton in excess of the delivered price of National Tube Company (R. 282). The purchaser is under penalty to get the pipe line laid and is going to any means he can to get it laid quickly (R. 282).

The Trans-Arabian pipe line provides for 30 and 31 inch diameter pipe to be delivered to the buyer at Consolidated's plant. National Tube Company was able to furnish only the pressure-gradient pipe in 24 and 26 inch sizes for that line and this constitutes about 7 per cent of the total. Companies other than Consolidated could make the larger pipe but did not have capacity for it under present conditions (R. 290-293, 338-339).

As its last point, appellant contends that Consolidated's more expensive but larger pipe offers prospective purchasers a valuable competitive choice. In evaluating this point it should be remembered there are a number of manufacturers of welded pipe by economical methods competitive with seamless. They, of course, can manufacture the larger diameter pipe claimed by appellant to furnish a competitive choice. The facts are that no customer considered pipe made by Consolidated to be sufficiently competitive to buy any of it from Consolidated until recently when the builders of the Southern Counties gas line was unable to buy pipe elsewhere and was forced to pay Consolidated's price (R. 408). Appellant's point is pure, abstract theory in direct contradiction of the evidence.

Mr. Roach testified that Consolidated is not able to sell its pipe to pipe line builders for the transmission of gas or oil when the pipe of National Tube, A. O. Smith or any other pipe manufacturer is available (R. 341).

The appellant makes one other statement that must be corrected. It says (Appt's Br. pp. 27, 47) that National Tube is no longer in a position to exercise patent control over Consolidated's manufacture of pipe. Mr. McConnor's testimony on cross-examination, explaining the patent to which appellant refers, was clearly to the effect that no measure of control in the manufacture of pipe was exercised by the patentee. National Tube Company, the patentor, granted a license to a manufacturer of welding materials and equipment, which in turn licensed Consolidated. The patent covered a process of welding steel and had no particular reference to pipe or any other products made by welding steel parts together (R. 287-288). That process was used extensively in war-time shipbuilding.

Consolidated's regular lines of pipe are made for irrigation and water-transmission and differ in types and sizes from the pipe made by National Tube Company (R. 281, 286, 336-341). Both Roach and McConnor testified unequivocally that their companies do not compete in the sale of pipe (R. 281, 282, 339). Both of them testified that the only reason Consolidated is able to sell pipe for oil and gas lines at a price $30 per ton higher than is being paid for other pipe is that none of the pipe made by National Tube, A. O. Smith or any other pipe fabricator is available (R. 282, 283, 340, 341). Mr. McConnor testified that the demand for line pipe is far in excess of supply due to interruptions of the war (R. 283).

The appellant's contentions find absolutely no support in the record, and all of the evidence, uncontradicted, unrefuted and without exception, shows that there is no competition between U. S. Steel and Consolidated in the manufacture and sale of pipe.

The Trial Court after hearing the witnesses found "the

two companies do not compete in the sale of their pipe products'' (Fdg. 20, R. 40). That Finding cannot be assailed by supposition and inference.

VI.

The charge of attempted monopoly.

Mr. Fairless testified unequivocally that he had no thought or purpose to restrain trade, to eliminate competition or a competitor or to monopolize in any respect. His testimony is corroborated by the entire history of the transaction and by every fact and circumstance involved.

The successful operation of the Geneva plant to foster employment and the industrial development of the West was the prime objective of the Government in selling the plant to U. S. Steel. The public officials charged with responsibility for the disposition of the Geneva plant reported to Congress that the attainment of that objective was of far-reaching public interest and importance (R. 295-296, 625).

U. S. Steel's purpose in negotiating the contract of December 14, 1947, with Consolidated was for a sound and lawful business reason (R. 380, 381).

While the charge of attempted monopoly is limited to fabricated steel products, the Attorney General did not consider that 39 per cent of the total ingot capacity of the Western market even approached a monopoly when he wrote Defendant's Exhibit 66 (R. 679). Nevertheless, appellant now refers to U. S. Steel's "already dominant position" in the sale of fabricated steel products in the Consolidated market despite the fact that the best it could do in presenting proof of this issue was to show by its Exhibit 31 (R. 564) that U. S. Steel had 12.9 per cent of the 1946 bookings of fabricated structural steel in the Consolidated market. Even this evidence was thoroughly discredited upon cross-examination of the witness Wein (R. 421-432).

Appellant does not contend that U. S. Steel had any fabricating plants in the Consolidated market.

The record is clear that a large part of the 17 per cent participation of U. S. Steel in the six years 1937-1942 was obtained under circumstances which no longer exist (R. 158, 200, 201) and that even in the pre-war period, the total business of U. S. Steel did not give it by any standard a "dominant position".

It no longer claims as error, although assigned as such, the Finding that "a reduction in price on rolled steel products produced at the Geneva steel plant made by United States Steel subsidiaries has created an additional competitive disadvantage for United States Steel subsidiaries in the sale of fabricated structural steel products in the 11 western States" (R. 71).

Nor does it now similarly claim as error that elimination of land grant rates and that "increases in commercial freight rates on fabricated structural steel have further increased the competitive disadvantages" of U. S. Steel in competition with western fabricators (R. 70).

Yet it claims (App'ts. Br., p. 31) U. S. Steel already has a dominant position in the 11 states and that its purposes in the proposed purchase constitutes an attempt to monopolize.

Its position is indefensible and forces the conclusion that this charge is a make-weight.

VII.

The Findings.

The Trial Court made the following Findings of Fact (R. 39-47):

> "16. The rolled steel requirements of Consolidated represent a small part of the consumption of rolled steel products in the 11 states constituting the Consolidated market. The evidence fails to show that the acquisition of the business and assets of Consolidated by Columbia will injure any competitor of U. S. Steel

subsidiaries which produces and sells rolled steel products or impair the ability of such competitor to compete with U. S. Steel subsidiaries in the production and sale of rolled steel products in the Consolidated market or elsewhere or otherwise restrict or suppress in any way competition in the production or sale of rolled steel products in the 11 states of the Consolidated market or will, in any way, be detrimental to the public interest. The business now owned by Consolidated is not a substantial market for the rolled steel products of producers which are selling such rolled steel products in competition with Columbia Steel Company and other wholly-owned subsidiaries of U. S. Steel.

"17. Purchasers of fabricated structural steel products usually solicit and accept bids from fabricators and award the work of fabricating and, if required, erecting the fabricated structural steel to the lowest qualified bidder. Such products are usually sold under individual contract to railroads, agencies of the federal government, contractors, owners and others and are fabricated to the specific design and requirements of the purchaser, as distinguished from products manufactured by repetitive processes for the general channels of trade and commerce. Light-weight, simple types of fabricated steel products can be fabricated economically by small fabricating plants and are sold at relatively low prices. Such products are for the most part sold locally because transportation costs involved in making delivery create competitive disadvantages which the more distant fabricators are unable to overcome. On the other hand, the large fabricating shops are equipped to fabricate economically specialized, complicated types of fabricated steel products that the small plants are, for the most part, unable to handle and that sell for relatively high prices, and transportation cost disadvantages are reduced on such products to an extent that the fabricators operating the large plants are able to expand their markets in varying degrees which, in the case of certain products, extend to all sections of the country.

"20. U. S. Steel subsidiaries do not make or sell any of the products which are made or sold by Consolidated

with the exception of certain fabricated structural steel products. * * * The two companies do not compete in the sale of their pipe products. * * * Such competition as has existed between Consolidated and U. S. Steel subsidiaries has been limited to occasional sales of such fabricated structural steel products.

"27. The competition that existed during the ten-year period from 1937 to 1946 between Consolidated and the U. S. Steel subsidiaries in the manufacture and sale of fabricated steel products was not substantial.

"32. The difference in cost of $12.65 per ton of fabricated structural steel delivered at West Coast destinations is larger than the profit which U. S. Steel subsidiaries are able to earn per ton of fabricated structural steel and such a disadvantage in cost eliminates them from the West Coast market except for specialized products which they are equipped to fabricate economically and which sell at higher prices per ton of product, thereby reducing the transportation charges in relation to total costs.

"35. * * * The acquisition of the fabricating facilities of Consolidated by U. S. Steel will reduce the existing competitive disadvantages which the U. S. Steel subsidiaries face in competition with Bethlehem and its West Coast subsidiary, Bethlehem Pacific Coast Steel Corporation, in the sale of fabricated structural steel products in the western states and will enable the U. S. Steel subsidiaries to compete on more even terms with Bethlehem and its subsidiary in that market.

"38. Competition between Consolidated and the U. S. Steel subsidiaries is not substantial and its elimination will have no appreciable effect on the competition in the sale of fabricated structural steel products in the 11 states, which competition is active and vigorous and may be expected to continue to be active and vigorous upon acquisition of the business and assets of Consolidated by Columbia.

"56. The purchase agreement was made by Columbia with the approval and assistance of U. S. Steel and U. S. Steel of Delaware for sound business reasons and with no intent to restrain trade and commerce,

eliminate competition or a competitor, or to monopolise the production and sale of fabricated steel products in the 11 states.

"57. A major purpose of the defendants Columbia, U. S. Steel and U. S. Steel of Delaware in making the purchase agreement was to provide an outlet for the products of Geneva steel plant which would give further assurance of its successful operation and thereby furnish satisfactory employment to almost 6,000 employees and fulfill the obligation to the government and to the citizens of the West that U. S. Steel would to the best of its ability operate the plant successfully and in the interest of the building of the industrial West.

"58. The effect of the reduction made by U. S. Steel subsidiaries in prices on rolled steel products produced at the Geneva steel plant has been to benefit fabricators and other users of such products in the western states and to create an additional competitive disadvantage for U. S. Steel subsidiaries in the sale of fabricated structural steel products in those states.

"59. The evidence does not disclose illegal conduct on the part of U. S. Steel or its subsidiaries in relation to Sections 1 or 2 of the Sherman Act.

"60. The purchase agreement does not have the effect of eliminating substantial competition in the sale of rolled steel products or in the manufacture and sale of fabricated steel products and the consummation of the purchase will not eliminate substantial competition in the sale of rolled steel products or in the manufacture and sale of fabricated steel products.

"61. In making the purchase agreement, Columbia, U. S. Steel, and U. S. Steel of Delaware have not concertedly attempted to monopolize the production and sale of fabricated steel products in the Consolidated market.

"62. The purchase agreement of December 14, 1946, was made for a sound and lawful business purpose.

"63. The consummation of the purchase agreement will not unreasonably restrain trade and commerce in

rolled steel products or fabricated steel products or be prejudicial to the public interest.

"64. Said consummation will not tend to create a monopoly in the production and sale of fabricated steel products."

These findings are fully supported by subsidiary evidentiary findings and by indisputed evidence and are not touched by appellant's casuistry.

SUMMARY OF ARGUMENT.

I.

The instant case involves a simple purchase and sales contract. It does not involve any combination or conspiracy, as those terms are commonly used in anti-trust cases. It was not entered into for the purpose "to exclude all companies other than U. S. Steel from the business of supplying Consolidated's requirements of rolled steel products."

The complaint charges neither a combination to violate the anti-trust laws in any respect nor a purpose to "exclude" competitors from any market.

The "basic question" is whether the necessary effect of the purchase will be to eliminate substantial competition in unreasonable restraint of trade.

The appellant now charges an unlawful combination and an unlawful acquisition of a competing company to bring the case within the rule of the *Yellow Cab Co.* case, a typical conspiracy case.

It was proven by undisputed testimony and every fact and circumstance in the case and found by the District Court that there was no purpose to restrain trade or to eliminate competition or a competitor.

A purpose to prevent competitors from making sales cannot be inferred from the mere fact of the purchase of a business to provide the purchaser with needed products

or to provide a use for its own products. If it could, no lawful sale of a business could be made to any one who desired to use its products or to provide use for its own products.

II.

The consummation of the purchase contract will not have the effect to eliminate substantial competition in either rolled or fabricated steel products in unreasonable restraint of trade or commerce.

This is the sole issue tendered by the complaint and litigated at the trial, except the charge of an attempt to monopolize the production and sale of fabricated steel products.

A. *Rolled Steel Products.*

Consolidated is not a competitor in the sale of such products.

U. S. Steel has in the past supplied Consolidated approximately half of its requirements of such products.

It was established by undisputed evidence and found by the District Court that the rolled steel requirements of Consolidated are a small part of the consumption of such products in the eleven state market, and that the business of Consolidated is not a substantial market for competitors of U. S. Steel.

There was no evidence that any competitor of U. S. Steel will be injured or its ability to compete impaired in any way by the consummation of the proposed purchase or that competition will be restricted or suppressed in any way by it.

On the contrary, it is established by the evidence and the findings that the market for rolled steel products in the eleven western states is being, and will continue to be, expanded as the direct result of the operation of the Geneva steel plant, further to assure which the purchase con-

tract was entered into by U. S. Steel. No one is excluded from that market.

B. *Fabricated Steel Products.*

1. *Structural Products.*

It was established by undisputed testimony and found by the District Court that competition in structural fabrication between U. S. Steel and Consolidated in the past has not been substantial, in fact that such inconsequential competition has already been practically eliminated and that such elimination will have no *appreciable* effect on competition, which is and will continue to be active and vigorous.

The absence of any substantial competition in the past has been due to the fact that even in the past U. S. Steel has competed in the Far West mainly for jobs which Consolidated is not equipped to undertake, with the result that there has only been slight and occasional fringe competition between them, and even that fringe competition has now been practically eliminated by the abolition of land grant freight rates, the great increases in commercial rates and the reduction in the price of rolled steel products to West Coast fabricators consequent on the operation of the Geneva plant.

2. *High Pressure Pipe.*

The District Court found on undisputed and unimpeached testimony that there had never been the slightest competition between Consolidated and the National Tube Co. in the pipe field.

Consolidated can, as can most plate fabricators, bend, shape and weld plates to form pipe up to large dimensions. National Tube can make high pressure pipe by the seamless method only up to 26" in diameter.

Consolidated never attempted to make such pipe until the present emergency. Because of the present extraordi-

nary demand for such pipe and the high price that it can secure, Consolidated has undertaken with temporary and make-shift facilities to make high pressure welded pipe and has secured some large orders which the companies regularly making such pipe competitively are unable to supply.

Consolidated is not competitive with the well-known manufacturers of high pressure welded pipe by other processes or with manufacturers of seamless pipe, of which there are several besides National Tube. There is not the slightest evidence that it has either the necessary plants and equipment or the financial ability to procure them to become competitive in the future.

3. *Potential Competition.*

The appellant is driven to assert that there is potential competition in any product that can be fabricated from steel, although it does not claim that there is the slightest actual competition in anything but high pressure pipe and fabricated structural products.

The claim is speculative and an obvious make-weight.

C. *The Public Interests.*

The appellant does not deny that the consummation of the proposed purchase will strengthen competition in the West in complicated and difficult fabrication work by assuring two competitors having the advantages now possessed by only one.

It does not deny that the Geneva steel plant needed additional outlets, in addition to the 386,000 tons provided by U. S. Steel itself by transferring that tonnage from one of its eastern mills, to operate even at a break-even rate.

It does not deny that the operation of the Geneva steel plant has already resulted in a substantial reduction in the price of rolled steel products to the consumers of such products in the West, or that new consuming industries

are already being encouraged to locate in the West by the operation of that plant, or that that was one of the paramount purposes of the government itself in selling the plant to U. S. Steel.

It does not deny that after the purchase, competition in rolled steel products and in fabricated steel products will be active and vigorous.

The appellant appears to think that the public interest is immaterial.

D. *The Governing Rule of the Instant Case.*

That rule was stated by Mr. Justice Holmes thirty-five years ago in *Nash* v. *U. S.*, 229 U. S. 373, 376, and has been steadily adhered to by this Court ever since.

That learned jurist said, referring to the Sherman Act,

> "Those cases may be taken to have established that only such contracts and combinations are within the Act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

The instant case meets every one of the prescribed tests of legality.

III.

Acquisitions are not *per se* violations of Section 1 of the Sherman Act because competitors of the acquiring company may be affected, where competition continues undiminished, as here, in the sale of rolled steel products.

Having failed on the issues raised by the pleadings and litigated below, the appellant now attempts to establish a *per se* violation of Section 1 of the Sherman Act regardless of the effect on competition in rolled steel products or whether there is a restraint of trade prejudicial to the public interest.

Its attempt only relates to rolled steel products. Consolidated is not a competitor in the sale of rolled steel products. It is a purchaser of rolled steel products.

The appellant bases its contention solely on the fact that the proposed purchase is to be made to provide an additional outlet for the products of the Geneva plant to enable it to operate at the break-even point.

It asserts that is unlawful despite the fact that sales of rolled steel products to Consolidated by others in the past have been trivial and inconsequential and despite the fact, as testified to by Mr. Fairless and found by the District Court, that the actual purpose was to enable U. S. Steel to discharge its obligation to the government and the people of the West to operate the Geneva plant to the best of its ability to the end that employment might be provided at Geneva for 6,000 employees and encouragement might be given to the industrial development of the West.

A normal purchase of an outlet where the proof is that competition in rolled steel products will continue undiminished and that competitors are strong and vigorous may not be converted into a *per se* violation of the Sherman Act by inferring a purpose to exclude competitors, a purpose that never existed.

IV.

The proposed purchase is not an illegal restraint under the Sherman Act which does not condemn *per se* an acquisition of assets.

We maintain that, absent an intent to monopolize the sale of rolled steel products, not charged, and absent the effect to eliminate substantial competition in restraint of trade to the prejudice of the public interest, the purchase contract was not within the purview of Section 1 of the Sherman Act.

The essence of the appellant's contention is that any change in competition by an acquisition of any size busi-

ness by a company of any size is *per se* a violation of the Sherman Act.

Of course, it does not venture to state its proposition that plainly. But reduced to its lowest terms that is what it amounts to.

Quite naturally the arguments in support of that proposition lead to inconsistencies and absurdities.

Neither the purpose of the Sherman Act nor the decisions of this Court support appellant. The adoption of any such theory would unduly restrict normal business transactions. The rule against undue restraints fully protects the public interest.

V.

The consummation of the purchase contract will not tend to monopolize the production and sale of fabricated steel products in the western market—the only attempt to monopolize charged by the complaint.

Appellant no longer relies upon its assignment of error to the findings that operation of the Geneva steel plant, with attendant reduction in the western price of rolled steel products, and increases in freight rates have further increased the competitive disadvantage of U. S. Steel in attempting to sell in the West fabricated structural steel products made only in the East. It does not press the assignment of error to the finding that the consummation of the proposed purchase will not tend to create monopoly in the production and sale of fabricated steel products but now asserts a "specific intent" to monopolize as a part of a monopolistic program, and it bases that charge, not on anything having the remotest bearing on structural fabrication in the West, but on the fact that U. S. Steel has made other acquisitions in the past, not one of which is claimed to have been made with any intent, or as having any tendency, to monopoly or as involving the slightest impropriety whatsoever.

U. S. Steel's latest and most important acquisition—in some respects more important than all the others put together—was of the Geneva steel plant from the government itself, in reliance on the opinion of the Attorney General, himself, that it did not offend the anti-trust laws. U. S. Steel increased its steel-making capacity by that acquisition in the amount of 1,282,000 tons, and thereby, according to the appellant, by omitting the production of Colorado, acquired more than 50 per cent of the ingot capacity of the West. The acquisition of Consolidated's fabricating plants and facilities will not give U. S. Steel one additional ton of steel-making capacity.

Any part of the fabrication business U. S. Steel may have after the purchase is not conceivably sufficient to support a charge of attempt to monopolize. The District Court found a lawful purpose and no intent to monopolize.

ARGUMENT.

Point I.

The instant case involves a simple purchase and sales contract. It does not involve any combination or conspiracy, as those terms are commonly used in anti-trust cases. It was not entered into for the purpose "to exclude all companies other than U. S. Steel from the business of supplying Consolidated's requirements of rolled steel products."

It is not charged that Consolidated and U. S. Steel combined or conspired to do anything or for any purpose. In fact, all they did was to enter into a simple purchase and sales contract, the one to sell and the other to buy Consolidated's fabricating plants and the goodwill of its fabricating business, "after arms' length negotiations" (Fdg. 54, R. 52).

~~There is no charge of any purpose to monopolize the sale~~ of *rolled steel products* but there is a charge of an attempt

to monopolize the production and sale of *fabricated steel products* (Par. 11, R. 3).

Yet the appellant says that "the *basic question*" presented is whether, what it persistently calls the acquisition of Consolidated by U. S. Steel, "constitutes * * * a combination in unlawful restraint of interstate commerce" with the "effect and for the purpose of monopolizing the business of supplying the rolled steel requirements of the acquired company and eliminating it as a market outlet for all other producers of rolled steel", (the appellant says "when" the acquisition is made with that effect and for that purpose and also in substance when the effect is to eliminate substantial competition in fabricated steel products) (Br., p. 2).

The complaint does charge that the effect of the purchase of the "business" of Consolidated, not Consolidated itself, will be to eliminate that business as a "substantial market for the rolled steel products" of other producers and "to eliminate substantial competition" in both rolled and fabricated steel products and that therefore said agreement is "in itself",—*i.e.,* by reason of said effect—"an unreasonable restraint of trade and commerce".

It does not allege that the purpose was to "monopolize" or to "eliminate" substantial competition in rolled steel products.

The only "purpose of said purchase" alleged was "to supply an assured outlet for a substantial quantity of rolled steel products produced by Columbia", meaning the Geneva steel plant, which is quite different from a purpose to monopolize or to eliminate competition (R. 3).

It should be observed that the purpose assumed in the appellant's so-called "basic question" is not a purpose to monopolize, or to eliminate competition in the market for rolled steel products generally or any particular segment of it; but only to monopolize, and to eliminate competition in, "the business of supplying the rolled steel requirements" of a company which, in fact, had decided to sell and on its own initiative has contracted to sell its fabricating plants and business to U. S. Steel. Neither purpose was alleged.

The appellant's Point II (App'ts. Br. p. 38) asserts that the "Acquisition of Consolidated by U. S. Steel * * * would constitute a combination in illegal restraint of interstate commerce".

Although it correctly says that the contract is to purchase the fixed assets, *i.e.*, the fabricating plants and facilities of Consolidated~~, and the~~ goodwill of its business, it treats the transaction throughout its brief as the acquisition of Consolidated itself by U. S. Steel.

It obviously does that to give verisimilitude to its claim of a combination. That claim is plainly made to bring the case within the rule of the *Yellow Cab Co.* case, 332 U. S. 218, which it cites as the governing case at the very outset of its argument.

That was a conspiracy case pure and simple. The complaint alleged a conspiracy to monopolize the sale of taxicabs, and this Court ruled that such a conspiracy was sufficiently alleged to require an answer. We take no exception to anything said by this Court in that case as applied to a conspiracy to monopolize, which, if established, is *per se* a violation of the Sherman Act.

We hasten to add that we do not contend that the purchase of a business with the purpose on the part of the purchaser unduly or unreasonably to restrain trade or commerce to the prejudice of the public interest is not equally illegal. Calling it a combination does not add to its illegality. But that term has a connotation which the appellant now finds it necessary for the first time to invoke. This record is barren of any suggestion that Consolidated and U. S. Steel had combined or conspired in any manner or for any purpose.

Of course, it is always important for a defendant in an anti-trust case to prove that the challenged transaction was for a sound business reason and without any illegal intent or purpose. The complaint here did charge an attempt to monopolize the production and sale of fabricated steel products. The charge was met by proof of the actual pur-

pose, and there was no dispute whatever in the evidence on the point.

A. *Purpose of the Purchase.*

Mr. Fairless, President of U. S. Steel, testified as to the purpose of acquiring the Consolidated plants. He had instituted negotiations for the Consolidated plants shortly after the Geneva plant had been sold to U. S. Steel by the government. The purchase of the Geneva plant had occurred after an invitation to bid had once been turned down and after pressure from many governmental officials and others toward getting U. S. Steel to purchase the Geneva plant. Negotiations with Consolidated were entered into after the Consolidated plants had twice been offered to U. S. Steel and before that to Bethlehem Steel Company, U. S. Steel's chief competitor, and after preliminary discussions with the Kaiser steel interests.

He testified that he never "had the slightest thought, intent or purpose to restrain trade and commerce, and to eliminate competition or any competitor" or "any thought of preventing anybody from selling anything" (R. 380-381) and that

> "The object was just one, one motive and only one motive, and that was to secure sufficient backlog to operate the newly acquired Geneva steel plant on a successful basis from the standpoint of furnishing satisfactory employment to almost 6,000 employees and also fulfilling the obligation which we had made to the Government and to the citizens of the West that we would, to the best of our ability, operate that plant successfully and in the interest of building up the industrial west. That was the only objective that I had at that time, and the only one I still have" (R. 381).

The contract was a simple purchase contract of certain assets and goodwill of the business with no requirement to sell or to liquidate or not engage in such business in the future at any time or place that it might see fit to do so.

The appellant had the hardihood to assert in its Statement of Jurisdiction, which was not printed, at page 8, that the Trial Court held "that U. S. Steel's deliberate acquisition of Consolidated for the avowed purpose of relieving U. S. Steel of the necessity of competing with other producers for Consolidated's rolled steel business is not an unreasonable restraint of trade * * *". It would be difficult to compress more errors in a single sentence. The Trial Court did not so rule; it expressly found the contrary (Fdgs. 56-57, R. 52). All the surrounding circumstances show what the purpose of the acquisition was. It certainly was not to restrain competition in anything.

The sound and adequate reasons for the proposed acquisition cannot successfully be disputed, and there was no attempt to dispute them.

Nevertheless, appellant claims that the purpose and effect of the acquisition is to exclude all companies other than U. S. Steel from the business of supplying Consolidated's requirements of rolled steel products and that this constitutes "monopolization of its purchases of rolled steel products" and that this "admittedly is the primary object of the acquisition" (Appt's. Br., p. 36).

A purchaser of a business to supply a legitimate need for its products or a legitimate use for his own products, with no thought of preventing others from making either sales or purchases, cannot justly be charged with a purpose never entertained. If the effect be unduly to restrain trade to the prejudice of the public interests, quite a different question is presented. We discuss that question later.

If the inference that appellant draws is a permissible one, it would be impossible to sell or buy the assets of any business, large or small, and regardless of the size of the buyer in the industry in which he competes, since it could be claimed a previous supplier of raw materials to the seller will be interfered with.

Since the company's assets were for sale, appellant would probably take the position that U. S. Steel would have to

let the assets be sold and thereby lose the participation it has had in Consolidated's business for fear of having its purpose misconstrued as that of attempting to exclude a competitor.

U. S. Steel had assumed the burden, to the best of its ability, to provide a sufficient outlet for the products of the Geneva plant to assure its operation, if it were practicable to do so, and its Chief Engineer had advised that to carry out the purposes for which the government had sold U. S. Steel the plant, it was necessary for U. S. Steel to go into the fabricating business on the West Coast. Having been twice invited by the President of Consolidated to enter into a negotiation for the purchase of Consolidated's fabricating business and plants, Mr. Fairless naturally decided, as anyone under the circumstances would have done, that, before undertaking to construct new plants under the conditions then prevailing, it would be best to ascertain whether the Consolidated plants would supply the need and whether they could be purchased for a reasonable price. As a result, a contract was made to purchase the business and plants for less than the estimated depreciated value of the plants alone.

The appellant now asserts that it was U. S. Steel's purpose to exclude competitors "from the business of supplying Consolidated's requirements of rolled steel products". If such an inference were even permissible, let alone required, few business transactions could survive attack, for, as Mr. Justice Brandeis said in the *Chicago Board of Trade* case, (246 U. S. 231, 238) every such transaction "restrains".

There have been many anti-trust suits involving mergers of suppliers and customers and the purchase of assets of suppliers or customers. They have been held proper on the ground that the procurement of market outlets or of needed products is a sound and lawful business reason.

U. S. v. Standard Oil Co. of N. J., 47 F. 2d 288, is a striking example. That was a proceeding supplementary to the

dissolution decree in the *Standard Oil* case. It was instituted to prevent the merger of two companies involved in that decree. It was defended on the ground, among others, that the merger was sought for the purpose, on the part of one of the companies, to expand its markets and, on the part of the other, to procure market outlets. Considered by itself, there was competition between them in a substantial amount, though the Court found that it was not substantial when considered in relation to the conditions in the oil industry and that such purposes were sound business reasons.

The government did not contend that a purpose to monopolize or to prevent others from making sales or purchases could even be inferred from said reasons, and did not appeal from the decree.

Our research has failed to disclose a single reported case, until the instant case, in which the Department of Justice has advanced the claim that a purpose to procure market outlets is an illegal purpose to prevent competitors from making sales.

Even if such a purpose could be inferred from the bare fact of the purchase of a business to secure outlets for the purchaser's products, it was rejected by the District Court.

B. Appellant's Citations on the Subject of Purpose.

We have sufficiently distinguished the *Yellow Cab Company* case for the present point.

Appellant cites *U. S.* v. *Reading Co.*, 253 U. S. 26, together with that case, as an instance where dominating power over a previously independent company would be obtained, not "by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control."

"Dominating power" and "vertical integration" are two of its pet phrases. Neither is involved in any issue in the instant case.

On the discredited testimony and data of Mr. Wein, rejected by the Trial Court, the appellant magnifies the importance of fabricating plants and a business being sold for $8,250,000 and the "dominant" position of U. S. Steel in a branch of the steel industry from which it is being driven in the western market by changing conditions, and now compares its effort to provide an outlet for the products of the Geneva steel plant, which no other qualified bidder was willing to undertake without government aid and which the government itself thought involved "considerable risk", with a "deliberate, calculated purchase for control".

Such exaggerations indicate the extremity to which the appellant is driven by the incontrovertible facts of the instant case.

The *Reading* case and *U. S.* v. *Lehigh Valley Railroad Co.*, 254 U. S. 255, were both commodities clause cases. Each involved a combination for the deliberate and avowed purpose of securing dominating control of the mining, transportation and sale of coal from a limited anthracite field.

The only other case cited under this point is *U. S.* v. *Swift & Co.*, 286 U. S. 106, and that only for the statement that "size carries with it an opportunity for abuse".

The Attorney General quoted that statement in holding that the sale of the Geneva plant to U. S. Steel would not violate the anti-trust laws. U. S. Steel is the same U. S. Steel to which it was lawful for the government to sell the Geneva plant in the hope that it might be able to perform the difficult task of keeping it running.

It is pertinent and apposite to observe with particular reference to the appellant's brief that size also "carries with it an opportunity to be abused".

The appellant indulges in that pastime in the instant case to supply the deficiencies of its cause, though its observations in that regard have no relevancy to any issue in the case.

Whatever the effect of the consummation of the purchase contract may be, it was entered into for a lawful purpose.

We turn now to the issues tendered by the complaint.

Point II.

The consummation of the purchase contract will not have the effect to eliminate substantial competition in either rolled or fabricated steel products in unreasonable restraint of trade or commerce.

That is the sole issue tendered by the complaint and litigated at the trial, apart from the charge of an attempt to monopolize the production and sale of fabricated steel products.

A. *Rolled Steel Products.*

Consolidated does not produce rolled steel products. It uses rolled steel products in the production of fabricated steel products.

U. S. Steel has in the past supplied Consolidated with approximately half of its requirements of rolled steel products, sometimes more, sometimes less (Defs.' Ex. 44, R. 595).

In 1940 nine eastern companies and Colorado Fuel and Iron Company, all producers of rolled steel products, supplied Consolidated with practically all of the balance of its requirements. Purchases made by Consolidated constituted less than 3/10 of 1% of their total sales. In 1946, an abnormal year, ten eastern companies and one western company supplied Consolidated with most of its rolled steel requirements, not supplied by U. S. Steel, but with one exception the sales of no company to Consolidated represented more than 1.88% of that company's total sales, and the average for all suppliers was 3/10 of 1% of their combined total sales. Sales figures of the one exception were not available, but that company supplied 3.7% of its estimated production to Consolidated (Fdg. 15, R. 38).

The appellant says that the "loss of Consolidated's purchases is not one which would be widely borne but would

have principal *impact on a few West Coast producers*" (Br., p. 28, emphasis supplied),—another typically misleading statement.

The most significant thing in the figures, given on page 15 of the appellant's brief, is that the sales of Columbia and the direct sale by two of U. S. Steel's eastern subsidiaries were 359,224 tons out of total purchases of 676,939 tons or nearly 52%, and that the sales of the one western producer in fact in '46 were less than 4 per cent of its total sales. The table on page 511 of the record shows how they were beginning in that year to taper off from the war years.

The appellant's grave error in attempting, for geographical and other reasons, to make it appear that 80% of Consolidated's purchases have been from Western producers is graphically exposed by its own Exhibit 2 (R. 511).

That shows the purchases from all suppliers for the ten-year period including the war years and the still abnormal year of 1946. There were a number of minor suppliers and about twenty-two important steel producers supplying rolled steel products, including U. S. Steel and Bethlehem Steel Company. All the other important producers in the list were eastern companies except Colorado Fuel & Iron Company and Kaiser Company.

That table also graphically shows how inconsequential the scattered sales were except possibly during the war years and how they began to taper off in the still abnormal year of 1946.

The District Court found:

> "Sales of fabricated structural steel made during war time and for war jobs cannot be considered representative of normal competitive conditions and afford no sound basis for determining the extent of competition between U. S. Steel subsidiaries and Consolidated" (Fdg. 29, R. 44-45).

Of course that applies with even greater force to plate sales, which were largely used in shipbuilding.

Exhibits 38 and 43 (R. 590, 594) show the rolled steel products sold country-wide and in the Consolidated market during the pre-war years 1937-1941, the only fair test of normal conditions. Consolidated's purchase (Defs.' Ex. 44, R. 595) amounted to less than ¼ of 1% of the consumption of the country and less than 2.4% of that of the Consolidated market (Fdg. 11, 12, R. 37, 38).

The purchase will eliminate no competitor from the Consolidated market. The competition will remain as keen as ever.

Far from restraining trade and commerce in rolled steel products in the western states, the consummation of the contract will expand such commerce by contributing to the successful operation of the Geneva plant and thus to the encouragement of new steel-consuming industries to locate in the West. The major purpose of the contract was to further the operation of that plant in normal times (Fdg. 57, R. 52). Already the operation of that plant has resulted in a substantial reduction in the price of steel plates and shapes to western consumers (Fdg. 31, R. 45).

There is no charge in the complaint of any intent, purpose or attempt to monopolize the sale of rolled steel products.

The appellant contends, however, that the purpose and effect of the acquisition is to exclude all companies other than U. S. Steel from the business of supplying Consolidated's requirements of rolled steel products, thus making such acquisition an illegal restraint of interstate commerce.

The District Court found:

> "16. The rolled steel requirements of Consolidated represent a small part of the consumption of rolled steel products in the 11 states constituting the Consolidated market. The evidence fails to show that the acquisition of the business and assets of Consolidated by Columbia will injure any competitor of U. S. Steel subsidiaries which produces and sells rolled steel products or impair the ability of such competitor to

compete with U. S. Steel subsidiaries in the production and sale of rolled steel products in the Consolidated market or elsewhere or otherwise restrict or suppress in any way competition in the production or sale of rolled steel products in the 11 states of the Consolidated market or will, in any way, be detrimental to the public interest. The business now owned by Consolidated is not a substantial market for the rolled steel products of producers which are selling such rolled steel products in competition with Columbia Steel Company and other wholly-owned subsidiaries of U. S. Steel" (Fdg. 16, R. 39).

The findings are based on the best available data compiled from authentic sources, not on unauthenticated replies to a questionnaire sent to numerous people (Ptf's. Ex. 34, R. 566-569). The appellant criticizes a single exhibit of many (Defs.' Ex. 63, R. 622), as showing a "large element of conjecture and hypothesis" (Br. pp. 16-17)—and does this in the face of the admitted methods of its own compiler of statistical data. The appellees' data were supported by the testimony of competent and reliable witnesses (Obbard, R. 139; Collins, R. 252, and Stringfield, R. 268).

The appellant says that "U. S. Steel now has over 50% of the total ingot capacity of the Pacific Coast Area". It does not include the capacity of the Colorado Fuel and Iron Company in the total. The Geneva Steel Company's capacity of 1,283,400 tons is included in the total and in U. S. Steel's proportion. U. S. Steel assumed the burden of making a success of that plant. The acquisition of that capacity was approved by the Attorney General himself.

The statement is made, obviously to enhance the importance of Consolidated, that in 1946 Consolidated's consumption of plates was 47 per cent of the estimated annual post-war consumption of plates in the Pacific Coast area. This is a poor statistical device upon which to postulate the purported seriousness of the restraint. Consolidated figures for 1946 contain 84 per cent war work and 16 per cent regular commercial business. In years of inflated

purchases, the purchases of Consolidated could only be compared properly with inflated purchases of all the other consumers of plate in the western states and these figures are not known.

It is known (Defs.' Ex. 38, R. 590) that national production of plates was 4,152,181 tons in 1946 (it was over 12 million tons during the war years of 1943-1944) of which Consolidated purchased for war work and commercial business only 107,128 tons or better than 2 per cent (Defs.' Ex. 44, R. 595). Based on industry plate production, U. S. Steel's plate production and its shipments to the Consolidated market and on the reasonable hypothesis that industry shipments into that area were in proportion to U. S. Steel's shipments, the plate purchases of Consolidated in 1946 represented about 17.8 per cent of total plate purchases in the eleven state area (Defs.' Exs. 38, 39, 40, 44a, R. 590, 591, 592, 595). In 1937, the only year for which complete figures are available Consolidated purchased 48,522 tons of plates or 1.4 per cent of national production of 3,373,892 tons and only about 16 per cent of the total consumption of 297,700 tons in the Consolidated market (Defs.' Exs. 38, 42, 44a, R. 590, 593, 595). These actual figures support the above estimate of 1946 consumption and together the data refutes any inference that Consolidated's consumption of plates is 47% of any market.

Appellant refers to tying irrevocably the largest independent consumer of plates with the largest producer to the injury of plate producers, particularly those on the West Coast. Its statement of Consolidated's position as a consumer is based, of course, on a complete misconstruction of the evidence (*supra*, pp. 25, 26). But passing that, appellant appears to champion the rights of a West Coast producer of plates—since there is only one in addition to U. S. Steel's production at Geneva, as appellant discloses (App'ts. Br. p. 35)—against the rights of Consolidated stockholders to dispose of their interest in Consolidated's properties. There is no evidence that this one producer of

plates could possibly be affected in any way that would hinder or impair its ability to compete with U. S. Steel. With respect to this one steel producer, the record discloses only that its 1946 sales to Consolidated are estimated at 3.7 per cent of its total production (Defs'. Ex. 33, R. 623). There is no evidence, and appellant did not offer to show whether this single producer wishes, in its own best interest, to retain its capacity to produce plates or prefers to use its steel-making capacity in the production of sheets, acutely needed in the West, or to enter the fabricating business, directly or indirectly, or to build a pipe mill and produce small-size pipe in competition with Consolidated, or whether Consolidated would be left high and dry if it depended on this producer for an adequate supply of plates.

Only the supervening requirement of protecting the public interest should be permitted to induce appellant to side with a 3.7% supplier against the owners of a business buying from that supplier—and it is conclusively established that the public interest of all on the West Coast will be benefited and not harmed by this transaction.

The fact is that plates are sold nationally rather than on a regional basis, and for ten years Consolidated used about 2% of national plate production (Defs' Exs. 38, 44A, R. 590, 595).

Appellant pretends to state appellees' defense as this: that vertical integration provides its own excuse for unlimited expansion and freedom from any barriers interposed by the Sherman Act (Appt's. Br., p. 37). This argument is answered later. Suffice at this point to say it is untrue and entirely unjustified.

Finally, appellant thinks U. S. Steel will not be injured because it can still compete for Consolidated tonnage and that it wants to avoid having so to compete. This has been fully answered (*supra*, p. 17), but it will bear repeating that the proposed purchase was not entered into for any such purpose and if Consolidated were sold to a competitor of U. S. Steel there would no longer be available

any of the particular business for which to compete (Ptf's. Ex. 8, R. 526). This argument of appellant makes sense only if appellant proposes to keep Consolidated indefinitely in the fabricating business against its own wishes.

B. *Fabricated Steel Products.*

1. *Structural Products.*

U. S. Steel does not make or sell any of the products made by Consolidated except certain fabricated structural steel products, and the competition in such products has been limited to occasional sales (Fdg. 20, R. 40).

This was established by the undisputed testimony of Mr. Obbard (R. 139, 414), Mr. Lawrence (R. 313, 368), Mr. McConnor (R. 276, 329), and Mr. Roach (R. 330, 399). Such competition has not been substantial and its elimination will not appreciably affect competition in the sale of fabricated structural products in the eleven states, where competition is and will continue to be active and vigorous (Fdgs. 27, 36, 38, R. 44-46). That was established by the uncontradicted testimony of Mr. Obbard (R. 173-202) and Mr. Roach (R. 335-336) and by unquestioned documentary evidence showing the broad extent of such competition (Defs.' Exs. 1, 2, 3, R. 579-583; Ptf's. Ex. 33, R. 565).

Defendants' Exhibits 57 (R. 612) and 62 (R. 618-621) tell the story of competition in structural steel products. They demonstrate that during the past ten years Consolidated has competed for only a trifling amount of the fabricated structural business done by U. S. Steel in the eleven western states, and that U. S. Steel has competed for only a trifling amount of such business done by Consolidated. In short, the two did different classes of work and there was only an occasional instance of fringe competition between them.

The kind and extent of competition is fully explained in the testimony of Mr. Obbard. There are many different types of structural fabrications. A few companies like

Bethlehem and U. S. Steel are equipped to handle all types. Other fabricators, large, medium and small fabricate particular types of fabricated products, usually of the less difficult and complicated kinds.

Business is secured by bids submitted to public agencies, railroads, contractors and the like. Mr. Obbard had the record of every bid submitted by U. S. Steel subsidiaries in the eleven states during the past ten years, and thus was able to demonstrate precisely what each job consisted of, what the competition was and what company secured the contract.

Consolidated's total structural business was only 16% of its total business (Fdg. 25, R. 44), and the business it secured in competition with subsidiaries of U. S. Steel was only 2.4% of its total business (Fdg. 25, R. 44).

A slight fringe competition heretofore existing between Consolidated and U. S. Steel has already been practically eliminated by the abolition of land grant freight rates to Federal agencies, to whom the major part of the structural work done by U. S. Steel has been sold (Fdg. 28, R. 44), the increase in commercial freight rates, and by the substantial reduction in the price of rolled steel products to the western fabricators effected by the operation of the Geneva steel plant (Fdg. 29-34, R. 45).

During the ten years 1937-1946 Consolidated competed with U. S. Steel for only 166 jobs of fabricated structural steel out of a total of 2,409 jobs for which U. S. Steel bid in the eleven states. Consolidated secured only 35 jobs, or an average of 3.5 jobs a year. U. S. Steel secured 839 jobs in all, including 49 jobs for which Consolidated competed. Consolidated bid on 6,377 jobs in all, including 166 jobs for which U. S. Steel competed. Other competitors secured 1,570 jobs in competition with U. S. Steel and 91 jobs in competition with both Consolidated and U. S. Steel (Defs'. Ex. 57, R. 612).

Appellant claims in this respect "that the competitive effect which U. S. Steel and Consolidated exert upon each

other is not confined to instances in which both bid on the same project" (Br., p. 42). It claims that the presence of one company in the market, even though it does not bid on a project, tends to keep prices close to cost and to assure reasonable service and quality by the other company. This can be said with respect to competition generally of which there is a great plenty in the Consolidated market on all kinds of projects upon which U. S. Steel bids. It cannot be said with respect to Consolidated on the kind of business upon which it does not compete, nor can it be said with respect to U. S. Steel's influence on Consolidated on the kinds of projects with which it does not compete with Consolidated.

The only fair test of the extent of competition is what actually happened. It would seem that a ten-year period would be a sufficient time to test fairly the amount of competition.

In support of its general statement that the consummation of the contract would eliminate substantial competition in the sale of structural steel products, appellant refers to the fact that Consolidated had 5 per cent of the total bookings of structural steel business in the eleven states for the ten-year period 1937-1946. Appellant fails to refer to the fact that Consolidated had only 85/100 of 1 per cent of such bookings nationally for the same period (Fdg. 21, R. 40-41).

The fact remains that Consolidated did have 5 per cent of the total bookings in the Consolidated market of this class of business in this period. There are two pertinent questions: Will the sale of Consolidated's plants to U. S. Steel eliminate this competition of 5 per cent? The answer is, of course, that it will not. Products produced in those plants will continue to compete with products produced of the same kind in all the other structural plants in the W st and also against similar products shipped by eastern fabricated structural producers into the eleven states. It cannot be assumed and there is no testimony to support an inference that under U. S. Steel management

the Consolidated plants would be less competitive than they are now.

The second question is: If the 5 per cent will not be eliminated, what is the percentage of competition affected? The above figures tell the story. The competition between the two companies is entirely negligible. Considered from an industry standpoint, the amount of competition that would be eliminated is a fraction so small as to be practically unnoticeable.

Although appellees at the trial gave full detail with respect to all of the competition between U. S. Steel and Consolidated, appellant now relies upon fourteen projects of the Bureau of Reclamation (the only evidence developed and offered in this case by appellant without the assistance of the appellees on the extent of competition between U. S. Steel and Consolidated).

I judging the probative value of this evidence, several factors should be remembered. These projects are limited to lettings on which both U. S. Steel and Consolidated bid, and there is no showing as to whether they include all Bureau of Reclamation projects upon which both concerns bid. Eleven out of the fourteen constitute eleven out of twenty-two jobs on which both U. S. Steel and Consolidated bid in 1946, but Consolidated bid on 836 jobs (Defs. Ex. 56, R. 611).

The bidding was at a time of abnormal demand for steel products, some Government agencies being forced to negotiate for their purchases and to forego competitive bidding.

On the first job (Pl. Ex. 14, R. 547) the low bid figure is $345 per ton. The freight disadvantage to U. S. Steel in Arizona is reduced, the higher price of the product reduces the relative importance of the transportation cost (R. 158-216, 224), and the testimony shows that U. S. Steel is still able to compete for this type of business (R. 198-201). Moreover, all these jobs were for government irrigation and hydro-electric projects now completed, an unusual and uncertain type of work at best.

Upon analysis, these hand-picked abstracts of bids cov-

ering principally a machine shop type of work (hydraulic gates and hoists) during a short period of extraordinary demand for steel prove nothing except to confirm the testimony of appellees' witnesses.

The other points appellant makes in its brief on this aspect of the case, such as objecting to using data for the eleven state area which it itself chose for the purpose of making its case and the inaccurate claim, as explained *supra* at page 32, that Consolidated had bettered its competitive position in 1946 and that U. S. Steel will have a little higher percentage of the structural steel business in the eleven states if it is able to build back to the pre-war basis and continues to secure Consolidated's participation, are all equally unpersuasive in establishing the point that it sets out to establish, namely, that there is substantial competition in the sale of structural steel projects which will be eliminated by consummation of the contract.

The appellant admits that "U. S. Steel's structural steel business * * * had been adversely affected * * * by the abolition of land grant rates, by increase in freight rates on shipments of structural steel products to the Pacific Coast, and by the establishment of Geneva as a price basing point for the rolled steel products used by fabricators of structural steel" (Br. p. 20).

The testimony of Mr. Obbard is, and the District Court found, that those factors had completely eliminated it from the Western market "except for specialized products" (R. 200-1, Fdg. 32, R. 45). Of course, there is always the possibility of a sale under special circumstances when the purchaser does not or cannot secure competitive bids.

There is no pretense that Consolidated is able to fabricate the large and complicated jobs. It is in a class between the small local fabricator and a fabricator like Bethlehem, which "is able to supplement the work of its medium-sized West Coast fabricating plants by fabricating the more difficult and complicated parts in its large eastern plants" (Fdg. 35, R. 46).

Bethlehem, with its medium-sized West Coast plants similar to Consolidated's and the ability to call on its eastern plants for complicated and difficult work is "the most important structural steel competitor of Consolidated in the western states" (*id.*). Yet the appellant repeatedly asserts on discredited testimony and exhibits that U. S. Steel is first and Consolidated second in the western market and that U. S. Steel is adding to its dominating power that of the company next in importance.

There is no pretense that any fabricating plant on the West Coast can do the difficult and complicated work done by the eastern fabricators. The District Court found:

> "The acquisition of the fabricating facilities of Consolidated by U. S. Steel will reduce the existing competitive disadvantages which the U. S. Steel subsidiaries face in competition with Bethlehem and its West Coast subsidiary, Bethlehem Pacific Coast Steel Corporation, in the sale of fabricated structural steel products in the western states and will enable the U. S. Steel subsidiaries to compete on more even terms with Bethlehem and its subsidiary in that market". (Fdg. 35, R. 46.)

It is thus established that so far from eliminating competition or restraining trade in the structural fabricating business, the consummation of the purchase contract will strengthen competition in one respect in which it is now lessening.

2. *High Pressure Pipe*

The appellant has now limited its claim of actual competition to structural fabrication and high pressure pipe for oil and gas lines. Its treatment of the pipe business is characteristically misleading. It ignores the important facts and attempts to construct a case by drawing inferences from isolated facts in complete disregard of the controlling facts.

It says that Consolidated and National Tube "make and sell pipe of overlapping dimensions for use in pipe lines

for the transmission of oil and gas" and that each has made sales "running into many millions of dollars and each has sold pipe meeting the specifications set for the pipe to be used in particular pipe lines" in disregard of the facts stated (*supra*, pp. 37-42).

It says that those facts show that the District Court "manifestly erred" in finding that "the two companies do not compete in the sale of their pipe products". That is a finding of a definite and specific fact and is supported by the uncontradicted testimony of Mr. McConnor (R. 281, 282) and Mr. Roach (R. 341).

It even goes so far as to charge the District Court with giving a reason for the above finding "directly contrary to the testimony of the appellees' witnesses" due to "an incomplete examination of the evidence".

The reference (R. 59) is to the opinion of the learned District Judge. It is accurate and well stated. We invite this Court's particular attention to it. Again, it is supported by the uncontradicted testimony of Mr. McConnor (R. 281-282) and Mr. Roach (R. 339-341).

The appellant then quotes excerpts from the testimony of Mr. McConnor apart from context, and says that there is "some very indefinite testimony" to the effect that National Tube has a cost advantage over Consolidated but that "in the face of Consolidated's demonstrated ability to capture huge pipe-line orders, any assumption that it will be unable to compete on a price basis for 24" or 26" pipe when there no longer is a seller's market is highly speculative." It infers that Consolidated is able to compete with the well-known "electric welded pipe" manufacturers, A. O. Smith Company, Republic Steel Company and Youngstown Sheet and Tube Company, which, Mr. McConnor did say, gave National Tube "very stiff competition" and says that the pipe subsidiary of U. S. Steel with its vertical integration and dominating power is "losing ground", referring in a note to a report of the Iron and Steel Institute not in evidence.

The indefinite testimony referred to is again the very definite testimony of Mr. McConnor (R. 282) and Mr. Roach (R. 340-341) that Consolidated was able to sell 26" high pressure pipe to complete the El Paso line only because the contractor, subject to a penalty for any delay, had bought all the pipe he could secure from other manufacturers, including National Tube, and was willing to pay Consolidated $30 a ton more for its fabricated pipe to complete the line.

That is an example of Consolidated's "demonstrated ability to *capture* huge pipe line orders," and the evidence relied on to show potential competition. There is not the slightest excuse for the inference that Consolidated is able to compete with other manufacturers of high pressure welded pipe but conclusive evidence to the contrary as we will presently show.

Finally the appellant says that in any case, referring to possible competition in the future, "a prospective purchaser will then have a clear competitive choice between Consolidated's pipe and National Tube's smaller diameter, lower cost pipe." That illustrates the extreme to which the appellant is driven to make out the slightest prospect of any future competition. We dispose of that absurd proposition later (*infra*, pp. 76-77).

We have thus fully stated the substance of appellant's contentions respecting pipe to show the lengths to which it is prepared to go in an effort to select and rearrange the facts to its own liking.

To get an accurate picture before the Court in contrast to that portrayed by the appellant, we again state the essential facts.

The physical facts relating to the manufacture of pipe by U. S. Steel and by Consolidated have been discussed *supra*, pp. 36-37. Appellant still clings to the erroneous assumption that there is competition between the two companies in the sale of pipe. It attacks the finding of the District Court that the two companies "do not compete in the sale of their pipe products" (Fdg. 20, R. 40).

The opinion of the District Court is correct in all essentials. The Court states "it is in evidence that the only recent instance of the alternative use of one pipe for the other grew solely out of the impossibility of obtaining the kind desired." The Court was referring to pipe for transportation of gas and oil and correctly summarizes the testimony on this point.

Appellant completely forgets that what is in issue is the extent of competition. The sale under extraordinary conditions of line pipe by Consolidated at this time must be weighed with its ability to compete under ordinary conditions in the sale of this product. The testimony of the witnesses is unequivocal. Consolidated never has competed and does not compete now. It is producing line pipe because of an emergency and temporary demand. It has no equipment to compete from a cost standpoint under normal conditions.

Appellant has one noticeable omission in its argument. It does not state that U. S. Steel and Consolidated have competed for pipe business at any time or any place or that Consolidated has competed with any other regular maker of line pipe. Appellant is careful to limit its statement to the assertion that both companies made pipe suitable for oil and gas lines and both sold pipe for the same pipe lines (Appt's. Br., p. 43). There is ample testimony by Mr. McConnor, Vice-President of National Tube, testifying that there are five or six other seamless pipe manufacturers and that his company met "very stiff competition" from three welded pipe manufacturers, namely, A. O. Smith, Republic Steel Company, and Youngstown Sheet & Tube. Mr. Roach testified that there are others.

Appellant refers to the Southern Counties line as indicating that there is a competitive choice. The Southern Counties line was for 30″ pipe, which National Tube cannot produce but this size pipe is made by A. O. Smith and other welded pipe manufacturers and Mr. Roach testified that Consolidated cannot compete with them when their

pipe is available (R. 341). The testimony shows that the Pacific Gas and Electric Company bought pipe for a gas line from National Tube but did not get enough to do the job. Rather than wait a year to get more pipe from National Tube, the company bought pipe from Consolidated, even though it cost about $30 more per ton (R. 282, 283).

The El Paso line and the Trans-Arabian line are further instances of time and not cost being the important factor.

Competition implies an ability to compete on a comparable basis. This is not to say that the products have to be identical or made by the same process. It is clear, however, that each product must have sufficient desirability to induce a buyer to select it at the price at which it is offered. Both Roach and McConnor testified unequivocally that their companies do not compete in the sale of pipe (R. 281, 282, 339). Both testified that the only reason Consolidated is able to sell pipe for oil and gas lines at its prices is that none of the pipe made by National Tube, A. O. Smith, or any other pipe fabricator is available (R. 282, 283, 340, 341). The war interrupted the supply of pipe and the present demand is temporarily more than National Tube and other pipe manufacturers can furnish. Under these circumstances, it is the ability to get steel in the form of plates and the ability to produce pipe by fabricating processes that enables Consolidated to sell high-pressure trunk line pipe at a higher price than is charged by the pipe manufacturers. This is far from proving that there is competition.

To assert "a prospective purchaser will then have a clear competitive choice between Consolidated's pipe, with its higher cost compensating larger size, and National Tube's smaller diameter, lower cost pipe" is completely unfounded and the statement entirely unsupported by the record. It is, in fact, entirely contradicted by the record which shows other welded manufacturers capable of making the large diameter pipe economically.

It should be noted again that the inference in appellant's

brief with respect to Consolidated's future competition because of the expiration of a patent is absolutely unfounded and of no consequence. Mr. McConnor testified that a right to use a method of welding was licensed to Linde Air Products Co., which in turn licensed Consolidated. That method could be used for making pipe or any other welded steel product.

The fact is that in order to compete in normal times Consolidated would have to acquire a modern pipe plant at a cost in excess of its present assets. There is no suggestion anywhere in the record that Consolidated is either able or willing to enter competition in the production of line pipe under normal conditions.

3. *Potential Competition.*

There is no support in either the law or the cases for the proposition that a sale of assets is illegal by reason of the fact that even if there is no substantial competition at present there is the possibility of substantial competition in the future and that this possible competition, claimed to be of a substantial nature, makes the sale an illegal restraint. Nor is there any proof for the inference that "the evidence shows them to be potentially competitive beyond the limits of the existing competition."

Reference is made to Consolidated's war work. Consolidated was not the only company that engaged in war work on the Pacific Coast and elsewhere. Most of this work was done on cost-plus contracts, and Consolidated's portion of war work presumably was no more profitable than the war work of other companies, and was obviously a small fraction of the total.

Appellant speaks of financial ability in the post-war period by comparing pre-war and post-war assets. Nowhere is it shown what relationship those pre-war assets had to replacement costs of plant and equipment then in comparison with replacement costs at today's inflated prices. Nor does appellant attempt to demonstrate where, in addition

to replacement costs, Consolidated will get capital for its "potential" expansion.

The plaintiff cites *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, and quotes a portion of the opinion dealing with the 5 per cent of the products of each company which were sold in competitive markets. An analysis of this case demonstrates that it does not support appellant's arguments in any way. Instead of 5 per cent of the products of International Shoe Company and W. H. McElwain Company which the Court in that case found was the extent of competition, U. S. Steel and Consolidated sold only 1.2 per cent and 2.4 per cent of their respective sales in competition with each other. Hence, the total competition between U. S. Steel and Consolidated was much less than the competition between International Shoe Company and W. H. McElwain Company which the Court found to be less than substantial in that case.

It is to be expected that the appellant would not cite the decision in *United States* v. *Republic Steel Corp.* (D. C., N. D. Ohio, E. D., 1935), 11 F. Supp. 117, a Clayton Act case, an instructive decision from which appellant took no appeal.

The appellant cites *United States* v. *Standard Oil Co. of New Jersey* (D. C., E. D. Mo. 1931), 47 F. 2d 288. The Court in an informative opinion found for the defendants in that case. The decision, considered more fully elsewhere (*infra*, pp. 92-93), is authority against substantially every legal proposition advanced by the plaintiff's brief.

A comparison of all the appellant's cases fails to disclose a basis for its argument that the competition here was "sufficiently substantial." The elimination of Consolidated's competition on the business which it obtained in competition with U. S. Steel could not constitute an elimination of substantial competition any way it is considered and certainly not to a degree prejudicial to the public interest that would constitute an undue restraint of trade in contravention of the Sherman Act.

The claim, under Appellant's Point II (c), that there is potential competition in practically every product capable of being fabricated from steel is but another example of the appellant's willingness to go to any extreme. There is not the slightest evidence that Consolidated has the facilities, the financial ability or the disposition to become competitive with other high pressure pipe manufacturers or to engage in other lines of manufacture. Possible competition is not potential competition. If it were, practically every manufacturer would be a potential competitor of every other manufacturer.

Consolidated's management had decided in the best interests of its stockholders to sell its fabricating business and facilities long before Mr. Fairless decided to take up the proposed negotiation for their purchase by U. S. Steel. The reasons for this decision were certainly sufficient (R. 342).

Upon the consummation of the purchase contract, Consolidated will have the purchase price and its retained assets in the form of liquid capital. There is not a particle of evidence that it will suffice to construct a pipe plant with the facilities to become competitive with the well-known manufacturers of pipe, either welded or seamless, and it is obvious that it will not.

The appellant refers in a note (p. 27) to its expenditure of $700,000 for facilities for carrying out its pipe line contracts. The very fact that it is able to devote its energies to emergency work, as it did during the war, and to undertake work that it had never done before even for a pipe line in a foreign country proves that it is not competitive. The other pipe manufacturers had too much domestic business to undertake such a job (R. 292).

This $700,000 is not a drop in the bucket of the amount required for an efficient plant to produce high pressure pipe competitively (R. 645). It is, of course, being recovered in the higher price which Consolidated is now able to obtain. The fact that it can shape and weld plates to form high

pressure pipe by the use of high cost and inefficient facilities and can afford to do so because of the price received is no evidence of potential ability to compete, but quite the contrary.

We are, moreover, now dealing with the purchase contract and the question of its necessary effect in eliminating substantial competition, actual or potential. If U. S. Steel had not contracted to buy Consolidated's fabricating plants and the goodwill of that business, it could still have carried out its purpose to sell. U. S. Steel is not, and no other purchaser would be, responsible for the decision of Consolidated's stockholders and directors as to the disposition to be made of the proceeds of the sale and its other assets. As far as the purchase contract or U. S. Steel are concerned, they were left free to make any use of them they pleased. That, no doubt, explains one of the reasons why the appellant so persistently insists throughout its brief that Consolidated itself is being acquired by U. S. Steel, though its own statements disclose that that is not the fact.

A company which is selling its fabricating plants for less than their estimated depreciated value—an amount which would not suffice to build a modern blast furnace—is not a potential competitor in pipe manufacture or any other new undertaking. Changed conditions have eliminated U. S. Steel from the structural fabricating business of the West, except for specialized products. Even the Bethlehem Company only has medium-sized fabricating plants in the West. There is no evidence that there is the slightest likelihood that Consolidated would ever construct a fabricating plant to compete with either Bethlehem's or U. S. Steel's large eastern fabricating plants in the complicated and difficult kinds of structural fabrication.

It certainly takes more than a speculative and theoretical possibility to create a potential competitor.

A company, whose business was for sale and which was willing to sell its fabricating plants and their facilities for less than their estimated depreciated value, was not a po-

tential competitor in the sense in which that term is used with reference to the elimination of actual or potential competition.

The actual competition between Consolidated and U. S. Steel was not substantial. It has already been virtually eliminated. The potential competition is nil.

C. *The Public Interests.*

The appellant has little to say on this subject except it seems to admit that it would be in the public interest to have another fabricator on the Pacific Coast able to compete on more even terms with Bethlehem, but says that a restraint of trade "effected by a merger of competitors" is not rendered permissible for that reason (Br., p. 63).

It confuses direct restraints which are illegal *per se* with the sort of restraints charged in the instant case.

The former are conclusively presumed to be prejudicial to the public interests. Whether the public interests will, in fact, be prejudiced is the final consideration in the latter.

It was affirmatively proved, and is not disputed, that the consummation of the purchase contract will not prejudice but will foster and promote the public interests. The District Court found that the purchase agreement was made for a sound and lawful business purpose and that it will not prejudice the public interests (Fdgs. 62-3, R. 53). Its other findings show that it will promote the public interests (Fdgs. 35, 42, 47, R. 45-6, 48-50).

This is the rare anti-trust case in which the unimpeachable and uncontradicted evidence shows beyond doubt that the public interest will be served by the challenged transaction. The Government officials responsible for the disposition of the Geneva plant reported to Congress that the attainment of the successful operation to foster employment and the industrial development of the West was an objective of paramount public interest and importance.

U. S. Steel bid for the plant under pressure from various people, including Senators and public officials, and was

awarded the property after the Attorney General had ruled that the sale would not violate the anti-trust laws.

Faced with the necessity of providing sufficient production to enable the plant to operate, U. S. Steel's officials concluded that among other essential arrangements, it would be necessary to go into the fabricating business on the West Coast to assure additional loads for Geneva's mills. They found that new fabricating plants would take three years to build and that Consolidated had facilities that U. S. Steel could use and that they could be purchased for a price U. S. Steel was willing to pay.

U. S. Steel had long considered the purchase or construction of fabricating plants on the West Coast. Increases in transportation costs, elimination of land grant rates and recently reduced delivered costs of rolled steel products to fabricators on the West Coast as the result of the operation of the Geneva plant had combined to eliminate U. S. Steel from competition in fabricated structural steel products on the Coast, except for a few higher priced products. The plans for such plants had been laid aside during the war, but the acquisition of the Geneva plant had brought them to life.

These are clear, sound and compelling business reasons for the acquisition contract. That the public interest will be served by the further assurance of successful operation of the Geneva plant is a matter of public record. That it will be further served by the added competition in fabricated structural steel products which U. S. Steel will provide on the West Coast is established by uncontradicted testimony and the findings of the Trial Court.

This Court has held through a long line of cases fully discussed under succeeding points that a restraint of trade, not illegal *per se*, must be shown to be undue and unreasonable to a degree that will be prejudicial to the public interests to bring it within the purview of the Sherman Act.

In *Nash* v. *United States* (229 U. S. 373, 376), Mr. Justice Holmes, in speaking of the *Standard Oil* and *American Tobacco* cases, said:

"Those cases may be taken to have established that only such contracts and combinations are within the Act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

Mr. Fairless testified categorically that there was no intent or purpose to restrain or monopolize trade or to eliminate competition. The circumstances under which the acquisition agreement was made not only bear him out but prove without question that the public interest will be served by the consummation of the acquisition agreement.

The courts have properly examined the motives and purposes of the parties to the merging of competing interests, as well as the effects of such action.

In *United States* v. *Standard Oil Co. of New Jersey, et al.* (D. C., E. D. Mo. 1931), 47 F. 2d 288, Circuit Judge Stone said at page 310 of his opinion:

"* * * it is clear that there are sound business reasons for this merger which are entirely sufficient and are wholly unconnected with any design to create a monopoly."*

In *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, this Court, through Mr. Justice Sutherland, observed on page 301 that:

* Cf. *United States* v. *Republic Steel Corporation* (D. C. N. D. Ohio E. D. 1935), 11 F. Supp. 117, District Judge Raymond made the following observations at page 124 that are pertinent to this case:

"The record is devoid of proof that consummation of the merger contract would be in any sense inimical to the interests of the public. While the evidence justifies the conclusion that competition is to some degree eliminated as to certain products, that competition may with propriety be designated as de minimis when compared with the competition in the industry as a whole, and as being insufficient to affect the public interest when considered in its relation to the total sales in the competitive areas included within the several states where the business of the merging companies is chiefly conducted. There is no evidence that the contemplated merger was entered upon with the purpose of lessening competition or of exercising control over competitive conditions in the steel industry. The practical impossibility of that accomplishment is so definitely disclosed that no such aim can fairly be implied."

"It is perfectly plain from all the evidence that the controlling purpose of the International in making the purchase in question was to secure additional factories, which it could not itself build with sufficient speed to meet the pressing requirements of its business."

U. S. Steel has the same pressing need for the facilities of Consolidated. The maintenance of a satisfactory rate of operation of the Geneva plant and the successful conduct of its business in fabricated structural steel products on the West Coast could better be assured by the prompt acquisition of fabricating facilities rather than the erection of new facilities with the attendant delay and increased expenditure of funds.

Bethlehem Steel Corporation is now the only producer of rolled steel products with fabricating plants on the West Coast, and has a decided advantage by being able to supplement the production of its medium-sized West Coast plants by having the more difficult and complicated work done in its eastern plants. The substitution of Columbia for Consolidated in the structural fabricating field will equalize Bethlehem's present advantage and give the West two such producers instead of one.

That this will be a distinct benefit to consumers is evident. That situation, though not so plainly established, was considered by a Statutory Court in the case of *United States* v. *E. I. duPont de Nemours & Co., et al.*, 273 Fed. 869.

In that case the Government opposed the petition of Hercules Powder Company to acquire possession of the Aetna Explosives Company on grounds that the transaction would be opposed to the spirit of the final decree in the *duPont* case and would have a tendency detrimental to the purpose of the Sherman Act. Judge Wooley said in part at page 875:

"A careful review of the explosives industry set forth by the petitioner in elaborate detail with reference to areas of consumption, number and distribution

of producing plants, and competitive conditions, the accuracy of which is in no particular challenged, has convinced us that in permitting the Hercules Powder Company to acquire the several properties of the Aetna Explosives Company actual competition in the industry within their respective regions will remain undiminished, though the number of competitors will, of course, be reduced by the withdrawal of one. Indeed, it is persuasively represented that competition will be increased by thus strengthening the Hercules Powder Company in its contest for business against the duPont Company, its strongest rival."

In this case, the evidence is conclusive that the competition that will remain upon acquisition of Consolidated by Columbia will be ample for the protection of the public. The District Court found that this competition is active and vigorous and will continue to be active and vigorous.*

The successful operation of the Geneva plant was reported by the public official charged with its sale to be of paramount public importance and the Court found that

* Senator Edmunds expressed the intent of Congress in an article called "The Interstate Trust and Commerce Act of 1890," which appeared December, 1911, in 194 North American Review at page 801, as follows:

"* * * After most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific descriptions all the acts which should come within the meaning and purposes of the words 'trade' and 'commerce' or 'trust', or the words 'restraint' or 'monopolize', by precise and all-inclusive definitions; and that these were truly matters for judicial consideration" (p. 813).

* * * * *

"* * * The Judiciary Committee believed that the well-known principles guiding the courts in the application and construction of statutes would lead them to give the words of the Act a beneficial and remedial rather than an injurious and technical one, hurtful * * * to any honest trade, as well as out of harmony with the beneficent spirit and policy of the whole Act" (p. 814).

* * * * *

"The fear that some literal construction of the words 'restraint of trade' in the Act might lead to the sacrifice of some just, fair and wholesome business arrangement may be safely dismissed, for if the principle and purpose of the Constitution and Act have any foundation at all there can be no such restraint, because such conduct is not restraining, but is promotive of and beneficial to the public interest" (p. 814).

competition in fabrication of structural steel products on the West Coast would continue to be active and vigorous upon acquisition of Consolidated's business by U. S. Steel. Surely, these results are consistent with the welfare of the whole people, are in the public interest and refute any purpose or intent on the part of U. S. Steel to monopolize trade or restrain or suppress competition in any way.

D. *The Governing Rule of the Instant Case.*

Perhaps the most precise and at the same time comprehensive statement of the rule was made by the late Mr. Justice Holmes in the *Nash* case, quoted *supra*, pp. 83, 84.

That statement of the rule has been cited several times by this Court with approval as in the cases of:

> *Thomsen* v. *Cayser*, 243 U. S. 66, 85;
> *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, 396;
> *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 360;
> *Sugar Institute* v. *U. S.*, 297 U. S. 553, 597;
> *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489.

The instant case meets every one of the prescribed tests of legality.

There will be no restriction of competition, but instead a strengthening of competition in fabricated structural products at the one point where it was weakening.

There will be no restriction of the course of trade, but instead an expansion of trade in rolled steel products.

There will be no prejudice to the public interests, but instead a promotion of the public interests in two important respects: (a) In strengthening competition in complicated and difficult structural fabrication and for jobs requiring both simple and complicated fabrication, and (b) in providing a sufficient additional outlet for the products of the Geneva plant to assure its operation, a consummation deemed by the Government itself of paramount public importance.

There was no inherently unlawful act, but a simple purchase and sales contract which imposed no restraints on either seller or buyer.

There was no wrongful intent, but a sound business reason to carry out the purposes for which it had purchased the Geneva steel plant from the government.

The Petition for Appeal seemed to indicate that appellant's purpose was to attempt to secure the substitution of the word "any" for "undue" in the rule above stated. But even that modification of the rule would not bring the instant case within the reach of the Act, since no restraint of trade is shown but instead a distinct expansion of the course of trade. The appellant has now taken another tack. It seems to contend that the rule enunciated in the *Standard Oil* case, 221 U. S. 1, does not apply because "competition is directly suppressed by acquisition of a competing concern" (Br., p. 57).

On page 31 it says that that case "did not involve, as does the instant case, a combination whereby competition was suppressed by bringing independent concerns under single control."

On the same page it seems to invite the Court "to state definitively how much competition must be eliminated in order that the resulting restraint of trade should be sufficiently substantial or grave to come within the condemnation of the statute." Is it asking this Court to say that it has been using the terms "undue" and "unreasonable" for nearly forty years as applied to unlawful restraints of trade in the sense of "any"?

It does not venture to say so directly.

Is it asking this Court to hold that a simple purchase and sales contract of a business and its plants without any restraints imposed on buyer or seller, constitutes a direct suppression of competition by "the acquisition of a competing concern" or an unlawful "combination" directly suppressing competition by "bringing independent concerns under a single control," although there

was no elimination of any competition, certainly none of any substantial competition, no restraint of trade but an expansion of trade, no acquisition of a competing concern, and although the contract was made for a sound business reason and with no intent or purpose to restrain trade or to suppress competition, and although it will not prejudice the public interests but will promote the public interest.

If so, it is asking this Court to overturn the settled law as recognized by both the Courts and the Congress, and lacks the forthrightness to say so directly, but hopes to accomplish its purpose by indirection.

It, in fact, proposes to have this Court erase the distinction between direct and indirect restraints, between intentional restraints and restraints resulting from acts done for sound reasons and with no unlawful intent, between inherently unlawful acts and acts which in and of themselves are entirely lawful, between acts which prejudice the public interest by reason of their intent or inherent nature, and lawful acts done for a lawful purpose which do not prejudice the public interest, though some restraint of trade be involved.

The rule stated by Mr. Justice Holmes thirty-five years ago, accepted and acted on by the Courts and the Congress ever since, recognizes those plain distinctions. The appellant attempts to confuse them by terminology.

The Congress has enacted several anti-trust laws and amendments of them, and has considered and rejected many proposed amendments, since the statement of the rule as above without changing Section 1 of the Sherman Act, thus implicitly approving the rule as stated.

It has by the Clayton Act prohibited the acquisition of the stock of one corporation by another, but only when the effect may be "to substantially lessen competition or tend to create a monopoly."

That is the sort of acquisition the appellant talks about. It would apply it to the instant case although it involves no substantial lessening of competition, in fact none at all,

but rather a strengthening of competition, and no tendency to monopoly, not even a creeping tendency.

The Courts have decided scores of anti-trust cases, and we challenge the appellant to name one even questioning that statement of the rule.

It is definite and precise, and properly applied, as this Court has applied it, will prevent any transaction which in intent or effect is prejudicial to the public interest by unduly restricting competition or the course of trade.

Point III.

Acquisitions are not per se violations of Section 1 of the Sherman Act because competitors of the acquiring company may be affected, where competition continues undiminished, as here, in the sale of rolled steel products.

Appellant's argument would convert the purpose behind every acquisition such as in the instant case into one to exclude competitors, thereby giving rise to a direct and illegal restraint violative of the Sherman Act regardless of the circumstances so long as the trade involved is "appreciable".

Mergers and combinations by acquisition of stock or assets have been common throughout the history of the anti-trust laws and it has never been suggested before, as far as can be ascertained, and certainly never decided that such acquisitions are unlawful *per se* just because a supplier of the selling company must thereafter look elsewhere for a small part of his business—or for any other reason.

Appellant cites the *Yellow Cab* case as authority for its claim that the purchase contract is unlawful *per se*.

The *Yellow Cab* case came to this Court on the sufficiency of a complaint which alleged illegal *direct* restraining purposes, presumed to be true for the purposes of the review made by this Court. The complaint alleged a combination and conspiracy to restrain and monopolize in the sale of

taxicabs to the cab operating companies and to impose and effect other direct restraints on competition. The complaint alleged that the conspiracy had the effect intended by the defendants of monopolizing the cab business in certain cities and excluding others from engaging in that business, of preventing the cab companies from purchasing cabs from other manufacturers and, by reason of the conspiracy, the cab companies were required to pay more for taxicabs and their expenditures were unnecessarily increased with the result that high rates were charged the public for transportation services.

The differences between the *Yellow Cab* case and this case are unmistakable. There was a charge of conspiracy to monopolize the sale of taxicabs in the *Yellow Cab* case. Here, there is no charge of conspiracy to monopolize the sale of rolled steel products. In the *Yellow Cab* case there was a charge of calculated purchase for control. Here, U. S. Steel, in the business of fabricating steel products for over 40 years, meeting new competitive factors, acquiring a new plant producing rolled steel products and having the fabricating facilities of Consolidated offered to it and having a need for such fabricating facilities, entered into the contract to purchase them. In the *Yellow Cab* case there was the allegation that the conspiracy adversely affected the public interest. Here, there is no charge or proof of any adverse effect on the public interest but rather unquestioned proof of substantial public benefits that will flow from the consummation of the purchase contract.

In the *Yellow Cab* case, if any conspiracy actually existed, the complaint was sufficient regardless, as this Court said, of the amount of commerce affected. Here, there is no conspiracy. None is alleged in the sale of rolled steel products and it can therefore not be claimed that the *Yellow Cab* decision makes this acquisition agreement an illegal restraint of trade *per se*.

This Court said in the *Yellow Cab* case, at page 227 of 332 U. S.:

> "The theory of the complaint, to borrow language from *United States* v. *Reading Co.*, 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'"

The Court then said:

> "If that theory is borne out in this case by the evidence, coupled with proof of undue restraint of interstate trade, a plain violation of the Act has occurred."

The *Yellow Cab* case is not authority for appellant's proposition that acquisitions of the character and under the circumstances involved here is *per se* illegal restraints.

The evidence in this case is conclusive that U. S. Steel purchased Consolidated's properties to acquire fabricating facilities that would provide an outlet for the products of the Geneva plant and to enable it to compete more effectively in the market for fabricated structural steel products in the West. This is the kind of acquisition dealt with by the Court in the *Socony-Vacuum* case (*United States* v. *Standard Oil Co.*, 47 F. 2d 288). It is not a reaching out for the purpose of controlling purchases as alleged in the *Yellow Cab* case or for the purpose of controlling sales and distribution as in the *Reading* case, which is also distinguishable for other reasons (see pp. 97-98).

The government sought in the *Socony-Vacuum* case, 47 F. 2d 288, to enjoin the merger of Standard Oil Company of New York and Vacuum Oil Company as a violation of the decree in *Standard Oil Co.* v. *United States*, 221 U. S. 1, but made no claim that the acquisition by Socony, an integrated company, of Vacuum's refining and marketing facilities as outlets for its surplus crude production was *per se* violative of the Sherman Act. The Statutory Court by Judge Stone held that the proposed merger would be a violation of the decree depending upon the actuating

intent of the parties and, in the absence of such intent, the merger would come within the decree if it were to restrain commerce in violation of the Sherman Act (p. 295). The Court stated (p. 310):

> "From the above, it is clear that there are sound business reasons for this merger which are entirely sufficient and are wholly unconnected with any design to create a monopoly. Where there are such reasons and no design (as here) to create a monopoly or to proceed toward monopoly thereby, such merger is not forbidden unless it naturally results in monopoly or the serious threat of monopoly. Whether such results are probable depends upon the entire related business situation."

The Court held on pages 317 and 318:

> "Since it is not claimed and the evidence shows that such merger is not induced by any motive or purpose to monopolize commerce in petroleum products, as an entirety or in any locality, but by legitimate business reasons alone, and since the evidence convinces that the result of such merger as to such commerce will not carry power to 'suppress competition' * * * or to keep others from entering the business * * * will not have a 'monopolistic tendency' * * * will not 'prejudice the public interest' * * * nor 'injuriously affect the public' * * * will not have the result to, and is not an attempt to, 'override normal market conditions' * * * and will not 'produce the same result as monopoly' * * * we conclude that it is not an 'undue' or 'unreasonable' restraint of interstate commerce within section 1 of the Sherman Anti-Trust Act (15 USCA § 1), nor a monopolization within section 2 (15 USCA § 2) thereof, and is therefore not in violation of that act. From this conclusion, it results that the merger is not within the inhibitions of section 6 of the decree, and therefore will not violate the decree."

The supplemental petition of the Department was dismissed.

No appeal was taken.

At no time in the course of the trial of that very important case did the Government contend that the "preemption" by Socony of Vacuum's facilities as outlets for its crude production was a violation of the Sherman Act because it would deprive other producers of an outlet. Of greater significance, is the fact that the court dwelt at length on this subject and emphasized that the merger was intended to provide such facilities for Socony and, rather than being illegal, such a purpose provided a sound business reason that dispelled any question of an intention to monopolize.

Point IV.

The proposed purchase is not an illegal restraint under the Sherman Act which does not condemn per se an acquisition of assets.

It is apparent appellant is arguing that any change in competition by acquisition of any kind by any size company is *per se* violative of Section 1 of the Sherman Act.

It is also apparent that appellant has struck out for new goals of business controls. Certainly none of the decided cases lends support or even plausibility to this lately discovered interpretation of the Sherman Act.

Under appropriate circumstances, as appellant says, "a combination in restraint of trade, violative of Section 1, is not necessarily a monopolization falling within the condemnation of Section 2" (Appt's. Br., p. 50). But appellant may not say "*For this reason* (*i.e.* because violations of Section 1 are not necessarily violations of Section 2), combinations which take the form of a merger or union of competitors may effect a restraint of trade forbidden by Section 1 although the combining parties may not have such power and purpose to fix prices or to exclude competitors as would make them an unlawful monopolization under Section 2 of the Act." (Emphasis added.)

Appellant claims that an agreement to fix prices is a com-

bination in restraint of trade prohibited by Section 1 of the Act (Appt's. Br., p. 52), and that price-fixing agreements are not the only illegal restraints, citing the *International Salt Company* and the *Fashion Originators Guild* cases. So be it. But it does not follow that a purchase of assets illegally "suppresses * * * all competition between the parties" or that therefore "on principle" ~~or otherwise~~, a sale of assets

> "between two independent enterprises competing with each other in sales representing an appreciable segment of interstate trade, constitutes a combination in restraint of trade forbidden by Section 1 of the Act and cannot be saved from condemnation by resort to any 'rule of reason'" (Appt's. Br., p. 53).

This construction of the law is interpreted nine pages later to mean

> "that this Court has adhered, with some slight divagations, to the view that a merger or other union of previously independent companies is a combination in illegal restraint of trade where the competition thereby eliminated is substantial in amount" (Br., p. 62).

Both statements are erroneous and they are mutually inconsistent. But assuming, for discussion, these two statements can be harmonized, they and appellant's analysis of cited cases, would appear to mean

(1) Any purchase of assets involving competition in sales which meets the test of being substantial in amount and an appreciable segment of interstate trade is *per se* illegal.

(2) Such a transaction is *per se* illegal because it violates Section 1 of the Sherman Act.

(3) Competition "substantial in amount" is equivalent to "competing in * * * sales representing an appreciable segment of interstate trade."

(4) Presumably both an appreciable segment and a substantial amount are to be determined in the absolute sense and not relatively by reference to the industry in question.

(5) The size and number of competitors and the amount of competition present to protect the public interest after the purchase is immaterial.

(6) The purpose of the transaction and its probable effect on competition are immaterial.

(7) The rule of reason has no application to purchase of assets cases.

Appellant has difficulty in explaining some of the principal cases which it cites and avoids this embarrassment by stating that its new theory does not apply to mergers if "the companies were not in competition at the time of their union" (Appt's. Br., p. 58, *United Shoe Machinery Co.* case but cf. appellant's position regarding *U. S.* v. *Reading Co.*, Br., p. 56); or where the "combination is attacked at its birth" (Appt's. Br., p. 60, *United States Steel* dissolution case but cf. appellant's explanation of *Standard Oil Co.* v. *U. S.*, Br., p. 57); or where the acquired company faces bankruptcy and the previous competition was less than 5% of each company's business (Appt's. Br., p. 61, *International Shoe* case).

Appellant does not explain discovery of this new theory of the law by the Department of Justice fifty-eight years after the passage of the Sherman Act.

In support of this new concept appellant first cites four cases involving railroads. These cases are:

> *Northern Securities Co.* v. *U. S.*, 193 U. S. 197;
> *U. S.* v. *Southern Pacific Co.*, 259 U. S. 214;
> *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61;
> *U. S.* v. *Reading Co.*, 253 U. S. 26.

None of these cases has any application as would tend to

prohibit the purchase in question. The *Northern Securities* case was clearly decided upon the basis of being a monopolistic combination with effective control of a large territory.

The *Union Pacific* case was another instance of monopoly control by the joining of two great transcontinental railroad systems through stock control. There was a large amount of interstate trade for which the two systems "were in competition sharp, well defined and vigorous", and the competing traffic "was large in volume, amounting to many millions of dollars". The Court found that the ownership of the Southern Pacific stock by Union Pacific was prejudicial to the public interest on account of its influence both on rates and competitive service to shippers, and that the intent and purpose of Union Pacific in acquiring the stock was wrongful and not for a sound business reason. It followed the rule which had been established in the *Northern Securities* case.

The *Southern Pacific* case was another instance of applying the theory of the *Northern Securities* case where the "effect of such acquisition is to suppress or materially reduce the free flow of competition in the channels of interstate trade," a condition not remotely present in the instant case.

Finally the appellant cites the *Reading* case for the proposition that where the Court found "avowed consistent purpose successfully carried out, to suppress anthracite production and transportation" there was a violation of the Sherman Act. Appellant could have cited another railroad case for the same proposition, *United States* v. *Lehigh Valley Railroad Company*, 254 U. S. 255.

Both the *Reading* and the *Lehigh Valley* cases were commodities clause cases. They involved combination for the deliberate and avowed purpose of securing dominating control of the mining and transportation of coal from a limited anthracite field.

Appellant admits that this Court placed common carrier

mergers in a special category with respect to the policy of the anti-trust laws in *Thomsen* v. *Cayser*, 243 U. S. 66, cited by appellant, that:

> "The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law" (p. 85).

This Court has said that a railroad is in a sense a regional monopoly and its relations with shippers have a special public interest. Thus, in the *Northern Securities* case, Mr. Justice Brewer in a concurring opinion said at page 363:

> "It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly."

Rather than support the appellant, an analysis of the opinions of the Justices of this Court since its judgments of dissolution in the *Standard Oil* and *American Tobacco* cases, and all the other Federal Courts following the precedents of this Court, discloses none supporting appellant's contention. To the contrary they prove the new theory is untenable.

The law does conclusively presume certain acts to be prejudicial to the public interests, for example, (a) direct price fixing and like arrangements (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392), combinations and conspiracies to monopolize or exclude competitors from the market (*Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457; *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218), or tying contracts for

bidden by the Clayton Act where the effect may be substantially to lessen competition or tend to create a monopoly (*International Salt Co.* v. *U. S.*, 332 U. S. 392).

The Sherman Act was carefully designed to forbid only restraints upon trade and commerce and Congress deliberately rejected the use of the language that would forbid all restraints upon competition. The Circuit Court of Delaware in *United States* v. *E. I. duPont de Nemours & Co.*, 188 Fed. 127, explained this phase of the legislative history of the Act at page 150:

> "A number of bills were introduced in the Fiftieth Congress (in August and September, 1888), designed to make unlawful every combination 'to prevent competition' and 'to prevent full and free competition' in the sales of articles transported from one state to another. None of them was enacted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-First Congress a bill which declared unlawful every combination 'to prevent full and free competition' in such sales. After much debate the bill was, on March 27, 1890, referred to the committee on judiciary, and on April 2, 1890, that committee reported it back to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several states, etc. When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of 'preventing competition' either in the purchase or sale of commodities; but the amendment was disagreed to."

In the *Standard Oil* case, 221 U. S. 1, this Court first said that the rule of reason becomes the guide to the construction of the Act.

> "To hold to the contrary would require the conclusion either that every contract, act, or combination of any

kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty" (p. 63).

The appellant now urges the construction of the statute which this Court so clearly repudiated in the *Standard Oil* case. The court there held that transactions of this character are illegal only when they adversely affect the public interest.

Chief Justice White wrote the opinions in both the *Standard Oil* case and the *American Tobacco* case, 221 U. S. 106. In the latter case, the Court found a fixed purpose to acquire dominion and control of the tobacco trade, not by the ordinary right to contract and trade, but by driving competitors out of business and other methods devised to monopolize the trade. Justice White explained the "rule of reason" at page 179-180:

"Applying the rule of reason to the construction of that statute, it was held in the *Standard Oil Case* that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade

> by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade', required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect."

In the instant case, there is no lessening of competition and not even a creeping tendency to monopoly. The purchase contract is not inherently unlawful. It is the mildest form of a type of contract made by the score since the enactment of the Sherman Act, without a suggestion of illegality from any quarter.

Since its decisions in the *Standard Oil Company* and the *American Tobacco Company* cases, this Court has frequently reiterated the rule. It is well stated by Mr. Justice Holmes in the *Nash* case "that only such contracts and combinations are within the Act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade."

This Court has repeatedly said that the Sherman Act does not prohibit every lessening of competition or all restraints of trade. Every decision of this Court in anti-trust cases to date has reiterated or assumed the correctness of the above-quoted rule. This Court has defined unreasonable and undue restraints to be those that "have a monopolistic tendency", or "prejudice the public interests" or "injuriously affect the public" or "carry power to suppress competition" or "keep others from entering the business" or "an attempt to override normal market conditions."

The cases using the above expressions are collated in the well-considered opinion of Circuit Judge Stone in *U. S.* v. *Standard Oil Co.*, 47 F. 2d 288, at page 298.

In *Chicago Board of Trade* v. *U. S.* (246 U. S. 231, 238), Mr. Justice Brandeis, said:

> "* * * the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains."

In *Appalachian Coals, Inc.* v. *U. S.* (288 U. S. 344, 360), Mr. Chief Justice Hughes quoted with approval the much-cited rule stated by Mr. Justice Holmes in the *Nash* case and the statement of Mr. Justice Brandeis in the *Chicago Board of Trade* case, above quoted, and said:

> "In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. * * * The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions."

The above quotations are peculiarly apposite. The instant case involves "enterprises fairly integrated in the interest of the promotion of commerce" with lawful intent and for sound business reasons and with the effect of promoting trade and commerce.

In *United States* v. *Winslow*, 227 U. S. 202, Mr. Justice Holmes stated (pp. 217-8):

> "* * * But taking it as true, we can see no greater objection to one corporation manufacturing seventy per cent of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion

of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine, and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt."

In *United States* v. *United Shoe Machinery Company of New Jersey, et al.*, 247 U. S. 32, the government contended that a combination in restraint of trade resulted from the consolidation on February 7, 1899, of seven companies into the United Shoe Machinery Company of New Jersey, a corporation organized for that purpose.

The court stated that the first question was whether the companies were in competition because all other considerations were dependent upon it. In this regard the court quoted with approval the statement of the court below that:

"It was not unlawful unless, to an extent injurious to the public interest, it destroyed competition" (p. 45).

The *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, a Clayton Act case, has been discussed. The appellant calls attention in a note to the fact that there were dissents in the case. They were on the ground that the evidence was sufficient to support the findings of the Commission, which, therefore, were not reviewable.

The judgment of the District Court in the instant case is supported by findings based on undisputed and incontrovertible evidence.

The *International Shoe* and the above cited *Republic* cases are instructive because they involved some measurement of what is meant by a substantial lessening of competition. But it is also worth noting with respect to both these merger cases that the government proceeded under the Clayton Act and not under Section 1 of the Sherman

Act and, moreover, never even hinted that either merger was illegal *per se.*

The words "undue" and "unreasonable" necessarily import that there may lawfully be some restraint of trade, some lessening of competition, in an appreciable amount, if the transaction involved is not inherently unlawful; yet the appellant would substitute the word "appreciable", which, in essence, means "any", for "undue" or "unreasonable". But this Court has been using those terms, ever since the dissolution decrees in the *Standard Oil* and *American Tobacco Company* cases, in a sense necessarily importing that there may lawfully be some restraints.

The amount of allowable restraints is not to be determined in a vacuum. What is substantial in one set of circumstances may be unsubstantial and inconsequential in another. A few thousand tons of rolled steel products are an inconsequential part of an industry production of sixty million tons or of an annual consumption of more than four million tons in the particular market involved, which, of course, includes many rolled steel products besides plates and shapes.

The ultimate test is not any abstract amount, but is rather the effect on the public interest, the presence or absence of injury to the public. In other words, the restraint on trade must be substantial to a degree that is harmful to the public.

There is a singularly erroneous argument in appellant's brief which requires answer. Appellant contends that its interpretation of the law must be adopted or the alternative is that the greater the amount and scope of business done by the acquiring company (and consequently the smaller proportion of mutually competitive business to the total), the greater would be its freedom to expand through absorption of competitors without violating the anti-trust laws (Appt's. Br., p. 62).

This thought attributed to appellees by a modification of the same idea that "restraint of trade" by merger of com-

petitors "is not rendered permissible by a showing that this will enable the acquiring company to compete more effectively with its remaining competitors. This principle, if sound, would have no ending point until only two competitors remained in the field."

Only a complete disregard of the cases interpreting the words "restraint of trade and commerce" would lead to any such unsound conclusion. Appellees do not contend for the *reductio ad absurdum* result attribruted to them. Quite the contrary.

The choice before this Court is not between sanctioning all purchases of assets on the one hand and a limit of two companies to an industry on the other.

The real question posed is the unreasonableness of the restraint under all the circumstances of the case. Those circumstances certainly include a view of the industry as to its competitive elements, both before and after the proposed purchase. It is certainly pertinent to dispel a charge of trade restraining violation of the Sherman Act that a purchase will not in fact restrain trade but will enable the acquiring company to "compete more effectively with its remaining competitors" (Appt's. Br. p. 63) when there are other numerous and powerful competitors.

Even assuming for the argument that this purchase is of a "competing concern" and that "competition" of the minor character involved here will no longer exist between Consolidated plants and other U. S. Steel plants, what legal interpretation can support or make applicable in the instant case statements like this:

> "Where competition is directly suppressed by acquisition of a competing concern, *the restraint is of a kind* which this Court has repeatedly held to be forbidden by the Act and there is therefore no occasion to resort to the interpretive rule announced in the Standard Oil case" (Appt's. Br., p. 57). (Emphasis added.)

It would be refreshing to hear appellant state to this Court that adoption of this new view of the law is not only

the objective of this action but also its point of decision.

In the instant case it was proved and found not only that the purchase contract will not eliminate any competition or restrain any trade and commerce in any respect or to any degree, but also that it will strengthen competition and promote trade and commerce, and further that it was entered into for sound business reasons and without any intent "to restrain trade and commerce and to eliminate competition or a competitor or to monopolize in any respect."

The findings also establish that said contract has no "monopolistic tendency", will not "prejudice the public interests" or "injuriously affect the public" or "carry power to suppress competition" or "keep others from entering the business" and that it was not entered into in "an attempt to override normal market conditions."

The instant case meets every test of innocence and legality ever applied by this Court and that, too, on undisputed evidence accepted by the Trial Court.

Point V.

The consummation of the purchase contract will not tend to monopolize the production and sale of fabricated steel products in the western market—the only attempt to monopolize charged by the complaint.

In support of its claim of "attempt to monopolize" fabricated steel products, appellant states that when considered against the background of U. S. Steel's "long history of acquisition" the program of having fabricating plants on the West Coast "tends to show the 'specific intent' required to establish an attempt to monopolize."

U. S. Steel is an integrated steel maker as that term is commonly understood and so are many other steel makers. It is gross misrepresentation to say U. S. Steel believes expansion at one level furnishes justification "for expansion at some other level."

The government's sale of Geneva to U. S. Steel is as a separate transaction and it is not being used to justify anything which would otherwise be wrong or illegal. Reference to this transaction is made to prove that U. S. Steel's purpose in acquiring the assets here in question is to carry out its objective and that of the Government at the time of the Geneva sale to it, namely, that the Geneva plant operate and thereby benefit the West. It conclusively demonstrates that appellant's inference of wrongful purpose is baseless. As shown elsewhere, a lawful and sound business reason for the transaction is one of the determining factors in deciding whether the restraint is unreasonable or was made with intent to monopolize.

Appellant quotes from *United States* v. *Aluminum Co.*, 148 F. 2d 416, 431-2 (CCA 2):

> "* * * For this reason conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden."

U. S. Steel's acquisition of Consolidated's facilities will increase at most its proportion of the structural fabricating business of the country from about 19.1 per cent to an estimated 20 per cent. In the eleven western states, its participation was about 17 per cent (but is declining); Consolidated's was about 5 per cent (R. 273); of that there is no dispute.

The Attorney General is sufficient authority, if any is needed, for the proposition that the addition of 1,283,400 tons of steel making capacity in 1946 and an increase in the proportion of such capacity in the western states from 17 per cent to 39 per cent will not tend to create a monopoly (R. 681). As elsewhere shown, U. S. Steel's participation in the steel ingot capacity of the country has been cut in half since its organization and is now only about one-third of the total. Likewise, in structural fabrication its business decreased from 44 per cent to 20 per cent (R. 238).

The appellant says that U. S. Steel has acquired other

properties over a period of 28 years. This, of course, is so, but no evidence was tendered as to the circumstances of these acquisitions (nor to show that such acquisitions were nothing compared with the improvements and replacements made by U. S. Steel during the same period), and appellant appears to assume that individually considered they were lawful. Certainly the Department of Justice took no action in respect of any of them, and of course none could successfully have been taken. All of the acquisitions referred to (App'ts. Br. p. 65) would scarcely equal in importance the Geneva transaction.

Appellant says that the proposed purchase will substantially increase U. S. Steel's dominant position in the sale of fabricated steel products in the eleven states. U. S. Steel does not have a dominant position as is elsewhere shown, while its largest competitor has three fabricating plants on the West Coast (R. 579).

Admittedly the acquisition is "conduct falling short of monopoly" and is therefore not illegal by any conceivable standard unless it is part of a "plan to monopolize or to gain such other control over the market as is equally forbidden". There is obviously no intent and no chance of gaining control of the fabricating market on the West Coast with hundreds of other fabricators present, both large and small. There is not the slightest evidence of a "plan to monopolize", or of anything which approaches the area of monopolization. In the *Aluminum* case the Court said, referring to over 90 per cent of ingot production:

> "That percentage is enough to constitute a monopoly: it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not" (p. 424).

The appellant has nothing to say about the finding of the District Court that "said consummation will not tend to create a monopoly in the production and sale of fabricated steel products" (Fdg. 64, R. 53).

It does not venture even to suggest that anyone in his senses would dream of making such an attempt.

It seems to think that prior purchases by U. S. Steel, not shown to have had the slightest tendency to monopoly or to have involved the slightest impropriety, and its unsupported and wholly false assertion that U. S. Steel believes that "integration at one level" justifies "expansion at some other level" are sufficient to move this Court to find, despite the findings of the District Court, that U. S. Steel intended to monopolize and that the purchase contract is a part of a monopolistic program, although it does not deny that U. S. Steel's actual purpose in entering into the purchase contract was to achieve the objectives for which the Government sold it the Geneva plant.

U. S. Steel, one of the appellees in the present appeal, is the same U. S. Steel which the Government wanted to undertake the difficult task of finding sufficient outlets for the products of the Geneva plant to warrant its operation and which the Attorney General thought good enough to make that attempt at its own risk.

Forwarding this task is certainly no warrant for the charges with which the appellant's brief abounds.

Conclusion.

Consummation of the proposed purchase agreement will not result in a combination in restraint of trade forbidden by Section 1 of the Act, nor will it constitute an attempt to monopolize prohibited by Section 2. Accordingly, we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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